Getting Real

Los Angeles lawyer William Archer analyzes recent litigation over reality television shows

28th Annual Entertainment Law Issue

Los Angeles Lawyer

May 2012 /$4

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When Irving Berlin wrote the song “There’s No Business Like Show Business” for the musical Annie Get Your Gun, he probably could not have imagined the enduring resonance of his lyrics. When the musical was created in 1946, this Broadway song-and-dance highlighted the perceived glamour and wonders of show business in an effort to lure Annie into the business. If anything, that lure appears stronger now than it was 66 years ago, as “show business” has expanded to forms and genres that were not then imaginable. Equally important, the song-and-dance routines used by those in show business today are frequently for purposes that lay far beyond luring in new talent.

For many, the dreams of stardom are unrelated to singing, dancing, or acting. Instead, as a result of the proliferation of reality television programs and the almost endless opportunities that exist in show business to exploit one’s personality, those who dream of stardom may believe they can reach their goal based upon little more than their personalities. And, for those who have reached stardom, it is hardly new to cash in on fame through means such as advertisements and endorsements.

In a time when personalities are deemed to have great value, it is not surprising that people go to great lengths to tap into and protect those values. Nor is it surprising that many legal claims have been asserted concerning rights of personality and publicity. In this 28th Annual Entertainment Law special issue, we explore the exploitation of personality through several different lenses.

Our cover article, written by William Archer, examines the state of the law concerning claims asserted by those who appear or are depicted on reality television programs as well as those who claim that their idea for a reality television program was stolen. As Archer explains, when it comes to reality television programs, the law provides producers with substantial latitude concerning the depiction of people, the use of their names and likeness, and even their ideas.

Ever watch a commercial with a celebrity spokesperson and wonder whether the celebrity is subject to liability if the product or services are not as represented? Nicholas Persky tackles that issue in his article. In fact, celebrities are not immune from liability when they pitch products and, in some circumstances, may be required to conduct a certain level of due diligence to support the bona fides of the pitch they give—even if the pitch was scripted for them. Caveat venditor, indeed.

Reality television programs do not have a monopoly on entertainment content based upon real events. To the contrary, long before reality television shows filled programming hours, there were numerous entertainment works “based upon” or “inspired by” true events, typically including disclaimers that they are purely fictional. Nevertheless, parties have asserted claims that certain works, although presented as fiction, were libelous. Lee S. Brenner, Edward E. Weiman, and Andrew W. DeFrancis survey the leading libel-in-fiction cases that have been litigated in state and federal courts in California and New York. As the authors explain, although there is no bright-line test, the claimant has a high burden of proof, and most of the cases have been disposed of against the claimant at the pleading or summary judgment stages.

Now, without further ado, on with the show.

When Fairness to All Is Paramount....

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Mastering the Art of Trial Preparation

TRIAL IS THE HOLY GRAIL for many civil and criminal litigators. When we were law students, many of us dreamed of the day when we could have a courtroom moment like the one Tom Cruise’s character has in A Few Good Men. Now that we are practicing young lawyers, however, many of us realize that we will wait years to enter a courtroom and even longer to present a case. This, in part, is due to the small percentage of cases that actually go to trial. Firms with large corporate clients also encounter the requirement that only the most experienced attorneys appear in court. However, when the opportunity for trial arises, young lawyers can be instrumental in a trial team’s success.

Preparation is the key factor in a party’s success at trial. Facts and the law influence the outcome at trial. Master them, and you can make yourself an indispensable asset. Mastering the facts requires a comprehensive understanding of all of them—helpful and harmful. As a junior attorney, you typically will be responsible for conducting the initial investigation, drafting discovery, and assisting in the preparation for depositions. Use these tasks to your advantage and become the authority on the facts. Take a step back and analyze the case as a juror may see it, and you may identify the problems that the opposition may exploit at trial. Identifying these early not only allows your team time to prepare an effective response but also solidifies your value to those more senior. Experienced civil litigator and trial attorney Michael J. Mueller emphasizes that as a “master of the facts, young attorneys can be most helpful in a trial. The partner in charge of the case constantly needs someone to turn to in order to fill in gaps in his or her knowledge of the facts. That includes both witness testimony and the potential exhibits. If you make yourself that person, you will become invaluable to the trial team.”

Similarly, it is important to understand the entire legal landscape as it relates to the issues involved in your case. It is easy to focus only on the favorable precedent supporting your client’s position when drafting a particular motion or research project. What will make you stand out, however, is your ability also to understand the weaknesses of your client’s position and anticipate and defuse opposing counsel’s arguments. This understanding enables you to draft effective discovery requests, tailor witness lists, and suggest motions that can favorably shape the trial. Furthermore, if your firm is litigating more than one case in a particular area, or multiple cases for a particular client, be mindful not to set forth an argument inconsistent with a position taken in another case.

Additionally, while your case is pending, make an effort to stay apprised of other decisions in your jurisdiction and any developments in the law. You may be surprised to discover how often the law is modified in the time it takes to litigate a case. Online research resources often provide the option to set up alerts for a particular client, area of law, or case. The Los Angeles County Bar Association offers several tools to assist lawyers in this area. (See http://www.lacba.org/courtnavigator.) By staying up-to-date on these developments, you can alert more senior attorneys to any changes that may affect your case. A supplemental brief to support any pending motions can leave a favorable impression on senior attorneys.

Developing a thorough understanding of the facts and the law, particularly for a complex case, may appear to be overwhelming. One way to maintain a complete picture of the case is to compile a case notebook. Add important pleadings, documents, and notes as the case develops to maintain a comprehensive understanding of the important issues, facts, and witnesses. A notebook also will allow you to remain organized as you draft pleadings and respond to partner inquiries as the case progresses. As a case approaches trial, you will then want to transition your case notebook to a trial notebook. Things commonly included in a trial notebook are an up-to-date contact list (including witnesses, attorneys, court reporters, and clerks), key pleadings, a chronology, relevant discovery materials, and court orders. Closer to trial, exhibit lists, witness lists, proposed jury instructions (and objections), motions in limine, and any dispositive motions should be added.

Lastly, if a case on which you are working goes to trial, make every effort to attend. There is no better training than watching lawyers in the courtroom, and if you have worked on the case, you will see the direct effects of your work on the course of the trial. Similarly, when your turn comes to try a case, it can be invaluable to visit the courtroom in which you will be trying the case and observe a trial before your assigned judge. By observing, you will find out how that judge runs the courtroom. You will be able to tell if the judge is punctual, low-key, no-nonsense, laid back, or a stickler for the rules. Further, attending a trial in front of the judge before whom you will try a case will allow you the opportunity to speak with people involved in other cases before the judge and gain information on the judge’s pet peeves. This can give your trial team an edge. You and your team do not want to find out the hard way what behavior particularly upsets your judge. If you scout a court, you will show a proactive approach to senior attorneys, who will appreciate your efforts. By focusing on the facts and details of a case that is approaching the courtroom, you can position yourself as a resource for senior attorneys as they prepare for trial, and you may become the next in line for courtroom experience.

Emily L. Aldrich practices labor and employment law as an associate at Hunton & Williams LLP in Los Angeles.
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IN THE ENTERTAINMENT INDUSTRY, complex deals are often the result of opaque contracts that use terms interchangeably. It is not unusual for these contracts to imply a preferential income, estate, or gift taxation treatment for entertainment assets that is simply not applicable. The Internal Revenue Code does not make it any easier to decipher the treatment of entertainment-related assets. Attorneys thus need to be aware of some of the benefits and burdens inherent in entertainment assets and other income streams—such as participations, residuals, and royalties—as they relate to income, estate, and gift taxation, and especially as they bear on various tax planning techniques.1

Participations, residuals, and music royalties are sometimes confused with copyright royalties. The main difference is that the former are simply a right to share in a future payment stream generated by the recipient’s participation in a movie or television show.2 Copyright royalties, on the other hand, are income resulting from the exploitation of an ownership in part or all of the underlying copyrights.

Copyrights are now created by federal statute and not through common or state law. The duration of a copyright for works created after January 1, 1978, is governed by the 1976 Copyright Act. The term of a copyright begins from the work’s fixation in a tangible form and depends on who created the copyright.3 The term is life plus 70 years for an individual and is the shorter of 95 years from publication or 120 years from creation if the work is created by an employee in the scope of employment or in a work-for-hire capacity.4

The foundational issue of which form of business entity to use or hold copyrights has an impact on the terms of the copyright as well as important tax implications. Among a C corporation, an S corporation, or a limited liability company, the LLC is generally the preferred entity for owning entertainment assets because it is largely subject to a single level of tax, capital gains flow through to its members, and it provides the ability to separate management from ownership.

C corporations should almost never be used to own entertainment assets—except as loan-out corporations—because of the risk of the double taxation of nondeductible distributions (such as reasonable salary expenses). Currently, the maximum federal corporate tax rate is 35 percent while the California corporate tax rate is 8.84 percent. C corporations will frequently pay significant compensation to shareholders to reduce the double level of tax. However, when C corporations distribute part or all of their after-tax income to their shareholders as a nondeductible dividend, the dividend is currently taxed at the shareholder level at the preferential federal dividend tax rate of 15 percent and at the California state rate of 10.3 percent. Due to the current fiscal crisis in federal and state budgets, these rates have become the subject of intense debate and may increase. In addition, long-term capital gains incurred by a C corporation are taxed at the higher, regular ordinary income rates and not the reduced capital gains rates available to individuals. Finally, C corporations are subject to an additional corporate level tax in the case of personal holding companies.7

Upon the death of a shareholder of a C corporation, the heirs receive a step-up in the basis of the stock to its fair market value for income tax purposes. However, the C corporation itself does not receive a step-up in the basis of the assets it holds. Therefore, all appreciation in the assets and any subsequent appreciation in the stock is generally taxable on a later sale.

While S corporations generally avoid significant entity level taxation (although California does impose a 1.5 percent corporate level tax, with an $800 minimum payment), they have other drawbacks. First, an S corporation may not include any foreign or entity share-tax tips

BY BRADFORD S. COHEN, ELIZABETH R. GLASGOW, AND ERIC S. JONES

Income, Estate, and Gift Taxation of Entertainment Assets

Bradford S. Cohen is a partner at Venable LLP in Los Angeles. His practice focuses on business and tax matters for clients in the motion picture, television, music, emerging media, and sports industries. Elizabeth R. Glasgow is an associate at Venable LLP in Los Angeles. Her practice focuses on trusts and estates and wealth management. Eric S. Jones is an associate at Venable LLP in Los Angeles. His practice focuses on a wide range of federal and state issues in the areas of corporate, partnership, international, and individual income tax and transactional matters.
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David Agler, JD, LL.M., Principal
instances change and members/partners come and out of these entities in a tax efficient manner is a key strength as business circum-
tances, partnerships may have foreign investors of eligible owners. Unlike S corpora-
tions, partnerships may have foreign investors and entities as owners. In addition, special tax allocations are generally allowed, except for family limited partnerships. The ability to provide for special allocations of income and expenses often makes it easier for LLCs and partnerships to attract needed capital. LLCs and partnerships are not typically used as loan-out entities since entertainment companies will generally withhold income and employment taxes from payments to them.

Contributions and distributions of property to LLCs and partnerships are generally tax-free. The ability to move property into and out of these entities in a tax efficient manner is a key strength as business circum-
stances change and members/partners come and go. It is important to note that some entertainment assets (e.g., participations and residuals) may not constitute property for purposes of these nonrecognition provisions. Finally, when a partner dies, the income tax basis of his or her share of the assets of the partnership can be stepped up to their fair market value on the date of the partner’s death.

An important concept to keep in mind when dealing with entertainment assets are the income in respect of decedent (IRD) rules. Generally, when a person dies, his or her heirs receive a fair-market value basis in the decedent’s assets. This tax basis can then typically be used to offset part or all of any potential gain arising from the sale of the assets. Therefore, absent a special rule, certain assets, such as participations in movies or television shows, would escape taxation completely. The IRD rules apply differently to sales of copyrights as opposed to licenses of copyrights, even though the payments streams may be the same.

Congress’s answer to this potential tax avoidance is the concept of IRD. For indi-
viduals, IRD includes income to which the decedent had a contingent claim at the time of his or her death. For S corporations, IRD includes income received by the S cor-
poration that would be IRD if received by an individual or estate directly. The IRD rules also apply to certain payments to deceased partners in the context of LLCs or partnerships.

The fair-market value of the remaining expected future income that would constitute IRD will be included in the decedent’s estate for estate tax purposes, and the basis of the assets that generate IRD are not stepped up to their fair-market value in the hands of the estate or the beneficiaries. In addition, there is no basis step-up for the portion of S corporation stock, LLC, or partnership inter-
est attributable to IRD property held by such entities. When part or all of the remaining IRD is received by the beneficiaries of the estate, those beneficiaries will have to include the amounts as income for income tax purposes. Thus, IRD is effectively subject to both estate and income tax. However, the beneficiaries may claim an income tax deduction for the portion of the estate tax that is attributable to this income.

Capital Gains and Ordinary Income

Capital assets are generally property other than inventory or property held for sale in the ordinary course of business or trade, business property subject to depreciation, and speci-
fied self-created assets. There is an exception to the self-created asset exclusion for musical compositions or copyrights in musical works that allows the creator to elect to have them treated as capital assets. This election is avail-
able to individuals, LLCs, partnerships, and S corporations.

Long-term capital gains are gains from the sale of a capital asset held by a taxpayer for more than 12 months. For self-created property, such as musical copyrights, the holding period begins when the work is created. Short-term capital gains earned by individu-
als are subject to tax at the regular ordinary income tax rates, while long-term capital gains earned by individuals are subject to tax at more favorable rates, usually 15 per-
cent for federal income tax purposes. However, capital gains earned by C corpo-
ations are subject to tax at the higher corporate rates and not the more favorable long-
term capital gains rates applicable to individuals. As a result, copyrights that are capital assets should not be held by C corporations, since a sale of the copyrights would result in a corporate level tax plus an additional tax at the shareholder level. If the copyrights had been held by an individual or pass-through entity, the gain would be taxed only once and only at the favorable long-
term capital gains rates.

In many cases, transfers of copyrights can be structured as either a sale or a license. That choice can have significant differences for income tax, IRD, and estate tax pur-
poses. In the case of a sale of a copyright that qualifies as a long-term capital asset by an individual, an LLC or partnership with indi-
vidual members, or an S corporation, the gains will be taxed at the lower capital gains rates. This will be true even if the sale proceeds are payable over a number of years. However, the income to be received after the death of the creator constitutes IRD, which would be included in the creator’s estate. As IRD property, the basis of the expected future income would not be stepped up to its fair market value on the date of death. This will result in higher taxes if the income stream is later sold. Conversely, in the case of a license of a copyright, the royalty or license pay-
mments will be taxed at the higher, ordinary income rates. Unlike a sale, however, the future income payments will not constitute IRD and the basis of the copyrights will be stepped up to their fair-market value, thereby reducing the taxes to be paid in a future sale of the copyrights. Thus, the owner of copyright is faced with a choice of having the payments from the exploitation of the copyrights taxed at the lower capital gains rates, but at the expense of having the remaining pay-
mements fall within the unfavorable IRD rules with no basis step-up upon the creator’s death.

Copyright Terminations

Copyrights are unusual assets because, under the 1976 Copyright Act, the creator enjoys an absolute, nonwaivable right to terminate a transfer. The right to terminate a previous copyright assignment or license can be a valu-
able right for the creator (especially since the
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right of termination does not require any repayment of the consideration originally received in exchange for the assignment or license of the copyright). Terminating the prior assignment or license can allow the creator to relicense the copyright at potentially higher and better terms than the first assignment. It can also be a source of frustration when implementing the creator’s transfer taxes plan, since the post-mortem termination right is available to the creator’s “statutory heirs,” who may circumvent the creator’s intended disposition of the copyright.

Copyright termination rights generally are available during a five-year window that begins 35 years after the assignment or license of the copyright.19 While the termination right cannot be waived by the creator or statutory heirs, the creator may be able to transfer a copyright not subject to the termination right of the creator’s statutory heirs by transferring the copyright through the creator’s last will and testament.20 This is a narrow exception and significantly limits the creator’s ability to transfer a copyright in accordance with his or her wishes.

For copyright termination purposes, the creator’s statutory heirs include the creator’s surviving spouse (if any), the creator’s surviving children, and the children of a predeceased child of the creator (the creator’s grandchildren), if any.21 If there are surviving children or grandchildren, the surviving spouse receives 50 percent of the termination right and any subsequent sale or relicensing proceeds that are produced as a result of the exercise of the termination right. If there are no surviving children or grandchildren, the surviving spouse receives 100 percent of the termination right and resulting proceeds. The creator’s surviving children and grandchildren receive the other 50 percent (or 100 percent if there is no surviving spouse) to be divided among them in per stirpital shares.22 If the creator is deceased, the termination right must be exercised by a majority of the statutory heirs holding the termination right as determined by their percentage of ownership.23 The exact procedure for the termination is cumbersome, so creators or their statutory heirs should consult with competent intellectual property law and estate counsel to ensure that the termination right is successfully exercised.

The creator’s surviving spouse, referred to in the 1976 Copyright Act as the “widow” or “widower,” is defined as “the author’s surviving spouse under the law of the author’s domicile at the time of his or her death, whether or not the [surviving] spouse has later remarried.”24 The continuation of the surviving spouse’s rights after remarriage increases the potential for conflict among the heirs, as the surviving spouse will not hold sufficient ownership in the termination right to exercise it alone if there is a surviving child or grandchild of the creator.25

After a successful exercise, the holder(s) of the termination right (the creator or the statutory heirs) can exploit the copyright for the remainder of the copyright term. In practice, this often includes selling or licensing the copyright back to the assignee from whom the copyright was reacquired—presumably at a higher price than the original contract to take into account the increased value and recognition of the copyright since the original acquisition. As an absolute owner, however, the holders are free to assign or license the copyright to a new third party or chose to allow the copyright to be unused.

The presence of the copyright termination right can be problematic for a creator who wishes to gift, sell, or transfer a copyright to an individual other than the creator’s statutory heirs. It is probably wise to assume that any lifetime transfer of a copyright provides no protection from the termination right of statutory heirs. Even a lifetime gift to a member of the statutory heirs, such as the creator’s spouse or children, does not protect the transferee, as the identity of the creator’s statutory heirs (including the surviving spouse) may not be determinable until after both the creator’s death and the exercise period for the termination right begins.

While the termination rights are not waivable, creators and their legal advisers who do not wish to use a limited-purpose will, may instead use an incentive structure that encourages statutory heirs to decline to exercise their termination rights. It is not uncommon for lifetime gifts in trust or testamentary bequests to be conditioned on certain events, such as surviving the decedent or attaining a certain age. Similarly, gifts in trust or bequests to statutory heirs of other assets could be conditioned upon the statutory heirs not exercising their termination rights with respect to the previously transferred copyrights (i.e., through the use of a no-contest clause). However, there is a possibility that a court might conclude that the use of a no-contest clause is void as being contrary to the public policy established in the 1976 Copyright Act.

The one limited statutory exception permitted by the Copyright Act to waive the termination right and thereby circumvent the exercise of a termination right by statutory heirs, is to transfer the copyright by last will and testament. In California, however, testamentary transfers by will are generally not recommended because of the requirements for probating the will, which involve a lengthy and expensive court process. To avoid probate, many individuals in California choose to create revocable living trusts through which they transfer assets at death. Unlike a will, a court need not be involved in the transfer of assets held by a trust, avoiding both the delay and expense as well as the publicity that occurs when an individual dies and the assets are probated through a will.

Under California state law, a living trust is a will substitute for all purposes of testamentary transfers.26 However, there does not appear to be any authority under the 1976 Copyright Act to extend the benefit of waiving termination rights for testamentary transfers by will to revocable living trusts or other state-recognized will substitutes. Accordingly, a creator has to choose between disposing of the copyrights either by will involving a public probate, or by a living trust without a public probate but risking that the statutory heirs will unwind the transfer.

Transfer Tax Planning Opportunities

Although the termination rights of statutory heirs create practical limitations on gift and estate planning with copyrights, a copyright creator or the owner of other entertainment assets should consider several transfer planning techniques. Generally, the same gift planning techniques that are available for any asset (such as outright gifts, gifts in trust, sales of partial interests that take advantage of lack of marketability and control discounts, etc.) are available for entertainment assets.27 It should be noted that many of the normal transfer tax planning techniques become more challenging in the case of copyrights because of their limited life, which has an impact on their valuation.

One common vehicle for the lifetime transfer of an asset is the charitable remainder trust. However, since the charitable income tax deduction is limited to the tax basis in the asset rather than the full fair market value of the asset, entertainment assets are generally a poor choice for funding a charitable remainder trust.

For holders of entertainment assets who would prefer to benefit individuals rather than charitable organizations, there are two common transfer tax planning techniques to consider: a sale to an intentionally defective grantor trust and a grantor retained annuity trust. A sale to an intentionally defective grantor trust28 involves 1) the creation of a trust for the intended beneficiaries, 2) an initial gift of cash by the donor to the trust, and 3) a sale of the entertainment asset from the donor to the trust. The purpose of this transfer is to remove the future appreciation and income stream of the entertainment asset from the donor’s estate for estate tax, but not income tax, purposes.29 The gift and subsequent sale may be structured so that the donor either gifts the entire purchase price, which is then
returned to the donor in the sale, or gifts a smaller amount as a down payment with the balance of the sales price satisfied by a promissory note issued from the trust to the donor. The use of a promissory note allows the donor to receive some ongoing payments in the form of interest income payable from the income stream generated by the entertainment asset. Current, historically low interest rates allow the donor to transfer more value to the trust than would otherwise be feasible.

Like a charitable remainder trust, a grantor retained annuity trust involves a transfer by a donor to a trust that retains a current income stream, in this case for the benefit of the donor, with the remainder of the assets in trust passing to or for the benefit of individuals selected by the donor at the end of a set term. Many favor the grantor retained annuity trust for transfer tax planning because it allows them to retain a current income stream from the entertainment asset that is generally larger than the interest income payable from the intentionally defective grantor trust sale. However, valuing copyrights and other entertainment assets can often be more difficult than valuing other assets.

For lifetime gifts to a qualified charitable organization, the donor of an entertainment asset generally receives an income tax deduction for contributions of the entertainment asset. The amount of the charitable income tax deduction is generally equal to the fair market value of the donated entertainment asset at the time of the contribution. However, in the case of self-created copyrights (other than self-created musical copyrights), patents, trademarks, and certain other property, the amount of the income tax deduction is reduced by the amount of any long-term capital gain. Notwithstanding the above, donors of qualified intellectual property, such as self-created musical copyrights, to a qualified charitable organization can claim significant income tax deductions under IRC Section 170(m). Annual charitable income tax deductions are available for a 120-month period in an amount equal to the income generated by the charity from the exploitation of the musical copyright, multiplied by a decreasing factor. This annual charitable income tax deduction can be extremely beneficial to the donor, especially if significant income is generated by the musical copyrights during the 120-month period. Note that certain record keeping requirements must be satisfied by the charitable organization in order for the donor to qualify for the deductions under Section 170(m). In addition, to qualify under Section 170(m), the donor may have to transfer his or her
entire interest in the musical copyright to the qualified charitable organization; a transfer of a partial interest in a musical copyright would generally not qualify.

While entertainment assets and income streams can present unique challenges for income and transfer tax planning purposes, many strategies are available to minimize adverse income, gift, and estate tax consequences and maximize preferential treatment. They require, however, careful planning that integrates corporate law, estate and gift planning, and income tax planning to achieve the desired objectives. A team approach by the advisers is required to make sure the best results are obtained for the client.

1 California also recognizes an entertainment asset referred to as the “right of publicity,” which protects an individual’s right to control the commercial use of his or her name, likeness, or personal characteristics. CIV. CODE §3344. As an entertainment asset, the right of publicity has similar income, gift, and estate tax planning issues, but along with trademarks and service marks are beyond the scope of this article.

2 These payment streams are deferred compensation payments that are subject to I.R.C. §409A. A discussion of the taxation of deferred compensation under §409A is beyond the scope of this article, but suffice it to say that when deferred compensation is present there are very technical and complex rules that must be complied with, lest the service provider be subject to severe income tax penalties at both the federal and state levels.

3 Different rules and terms apply to copyrights created before January 1, 1978, which are governed by the 1909 Copyright Act. The differences between the 1909 and 1976 Copyright Acts are significant, especially concerning the terms of the copyrights, and creators should carefully review the creation date of their copyright to confirm which copyright act applies. This article focuses on copyrights created after January 1, 1978.

4 I.R.C. §302.

5 This would apply to assets such as copyrights, trademarks, service marks, and other assets that may appreciate in value during the time they are held by a C corporation.

6 In tax planning for participations and residuals, C corporations or S corporations are commonly used as loan-out corporations to reduce the risk that entertainment companies will withhold income and employment taxes from payments for services rendered.

7 I.R.C. §541.

8 Certain trusts or single-member LLCs may be shareholders of an S corporation.

9 A built-in-gain will arise if the fair market value of the C corporation’s assets are higher than their tax bases on the date the C corporation converts to an S corporation.

10 I.R.C. §3362(d)(3).

11 See generally I.R.C. §§721, 731.

12 See generally I.R.C. §691 and Treas. Reg. §1.691(a)-1(b)(3).

13 I.R.C. §3367(b)(4).

14 I.R.C. §753.

15 The current long-term capital gains tax rate for individuals is 15%. Barring legislative action, the 15% preferential rate will expire on December 31, 2012. The resulting rate would be 20%.

16 Note that if payments are received over a number of different tax years, a portion of the capital gain will be recharacterized as interest income and taxed at the higher ordinary income tax rates. I.R.C. §453A(c).
Note that the basis of the stock of an S corporation attributable to IRD assets held by the S corporation would also not be stepped up to fair market value.

Under the 1976 Copyright Act, termination rights are not extended to copyrights for works made for hire. Trademarks, patents, participation rights, and other entertainment-related assets do not have a statutory termination right or comparable interest. In practice, contracts or assignments for other entertainment-related assets rarely include termination rights, as such provisions would reduce the value of the assets to the assignor.

If the assignment of the copyright included the right of publication of the copyrighted materials, the window begins at the earlier of 35 years from publication of the copyrighted material or 40 years from execution or grant of license for the copyright.

This is in addition to the conflict that may already exist if the surviving spouse is not related to the creator’s issue who hold the balance of the termination right.

An intentionally defective grantor trust is an irrevocable trust that qualifies as a grantor trust for income tax purposes, which means that although the trust is a separate legal entity, the donor is responsible for all income tax burdens and benefits of the trust on the donor’s individual income tax return.

Note that transfers of participations, residuals, and royalties raise assignment of income and I.R.C. §409A issues that should be carefully considered before any transfers. In addition, they may not constitute “property” and thus may not qualify for certain tax-free transfers, I.R.C. §351, 721.

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The Danger of Using Finders to Finance Entertainment Projects

THE ENTERTAINMENT INDUSTRY HAS GLAMOUR, fame, sex appeal, scandal, power, riches and many other attributes that lure people to it. What it does not have is an endless supply of capital. And some of its products, such as motion pictures and television programs, require significant capital to produce, market, and distribute.

One might expect that the major studios, which command the vast majority of North American revenue and a significant share of worldwide revenue from distribution of entertainment content, could underwrite most of their projects, especially since they are owned by large conglomerates. Hollywood, however, is different. To diversify risk, the majors frequently shift the costs of production of film and television projects to independent companies and producers. In turn, these smaller players, which often lack sufficient capital reserves, find themselves constantly in pursuit of capital to fund projects.

As a result of this never-ending need for capital, players in the entertainment industry often turn to finders to assist them in raising capital. In turn, this practice has yielded a proliferation of people now claiming expertise in finding capital for entertainment-related financings. Unfortunately, many such finders operate very close to (or, in some instances, over) the line between those who are required to be licensed to market and provide advice concerning financial transactions, and those who are not. In fact, some purported finders do not seem to care about the requirements but instead shamelessly promote financing opportunities based largely upon the lure of the entertainment industry rather than true and accurate financial consideration for what they are promoting.

A leading factor (valid or not) among producers on the creative side of the entertainment business is that finders can help free producers from the many burdens and distractions attendant to raising capital, including endless meetings and other time-consuming undertakings. As a consequence, many finders have been able to craft a unique and highly lucrative niche for themselves, and across the entertainment industry a pervading sentiment seems to be that there are few, if any, legal implications associated with employing finders. That belief is ill-founded.

Since virtually all financing transactions involve the sale of a security (equity or a debt instrument), federal and state securities laws are implicated. At the federal level, transactions in which securities are sold must comply with the U.S. Securities Act of 19331 and the Securities Exchange Act of 1934 (Exchange Act).2 In California, similar transactions must comply with the Corporations Code and related regulations.

For the most part, however, the securities that are included in entertainment financing transactions are not registered under federal or state law. Instead, parties who sell (i.e., issue) a security for the financing of entertainment projects typically rely upon exemptions, in particular an exemption from registration in accordance with Rule 506 of Regulation D of the Securities Act, which also preempts state blue-sky laws.3 In deals that fall under this exemption, third-party investors obtain an ownership stake in the investment vehicle by purchasing a security issued by the investment vehicle, usually, a membership or partnership interests or units. In return, the investor receives the right to participate in certain profits of the investment vehicle—for example, a share of the profits (if any) from a motion picture after certain costs, fees, and expenses are paid.

In return for helping to arrange financing, finders ordinarily request fees (a percentage of the financing they source), screen credits (such as an executive producer credit), and a share of the profits. Because the fee component of compensation, in most cases, is contingent upon the success of obtaining financing, it is referred to as transaction-based compensation. Transaction-based compensation, however, implicates a host of securities laws and regulations. One exemption does not fit all finders.

A brief review of current securities law offers insight into why finders may fall afoul of regulations. During the Great Depression, the federal government decided to protect investors from unscrupulous sellers of securities and enacted various rules and regulations. One of the principal mandates of these laws and regulations was to establish a framework whereby persons involved in raising capital on behalf of others would be required to adhere to certain standards and be properly licensed. These regulations were adopted to minimize abuse and fraud.4 Since 1935, brokers and dealers in securities have been required to register with the Securities Exchange Commission.5 California later adopted similar statutes and regulations.6

Unless a finder is in compliance with applicable broker-dealer statutes, rules, and regulations, he or she may be acting without legal authority, which could have extremely adverse implications for all involved. Therefore, it is critical for those who represent finders and parties who engage finders to know when a finder has exceeded any possible exemption and may instead be engaging in activities that require licensure as a broker-dealer.

The Exchange Act provides that a broker is “any person engaged in the business of effecting transactions in securities for the account of others.”7 Similarly, Section 3(a)(5)(A) of the act provides that a “dealer” is “any person engaged in the business of buying and selling securities for such person’s own account through a broker or otherwise.”8 Further, Section 15(a)(1) makes it unlawful for any broker or dealer to “effect any transactions in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers’ acceptances, or commercial bills) unless such broker or dealer is registered....”9

The definition of a “broker-dealer” under California law is virtually identical to the federal definitions.10 In addition, California law provides that “no broker-dealer shall effect any transaction in, or induce or attempt to induce the same of, any security in this state unless the broker-dealer has first...secured from the commissioner a certificate, then in effect, authorizing that person to act in that capacity.”11

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In addition to SEC oversight, activities of broker-dealers also are regulated at the federal level by the Financial Industry Regulatory Authority (FINRA) and, at the state level, by the various state securities commissioners. In California, the commissioner of corporations, acting on behalf of the California Department of Corporations, possesses oversight. Unless an exemption exists, broker-dealers must register with the SEC and become members of a self-regulatory organization, such as FINRA or any of the national securities exchanges, and the Securities Investor Protection Corporation. Broker-dealers operating in California also must obtain a license from the commissioner of corporations.

However, the Exchange Act, the rules and regulations promulgated thereunder, and California’s comparable statutes do not define the term “finder.” Nor do they define what is meant by “engaging in the business of effecting transactions in securities.”

Finders often maintain that they are not subject to broker-dealer registration requirements because they are not engaged in the business of effecting securities transactions. They may argue that they merely “find” and place in contact potential buyers and sellers of securities who will then complete resulting transactions. Also, frequently it is asserted that parties who provide “consulting” or “advisory” services ancillary to the company’s capital-raising efforts are not subject to regulation. Guidance issued by the SEC and related federal and state case law, however, do not support these propositions in the abstract or as a generally applicable exception to licensure.

At the federal level, whether a person is acting in the capacity of a finder or a broker-dealer typically is a factual determination. As one expert has explained: “[C]onducting sales efforts...participating in negotiations between buyers and sellers of securities...and receiving transaction-based compensation are hallmarks of the broker-dealer. Engaging in any one of these activities may be sufficient to require registration if carried on with any degree of regularity.” SEC guidance similarly identifies “finders” as persons engaging in activities such as 1) finding investors for issuers, even in a “consultant” capacity, 2) finding investors for, working with, and splitting commissions with broker-dealers, and 3) finding investors for venture capital or “angel” financings, including private placements. In California, determining “whether a person acted as a finder or broker, moreover, is a question of fact.”

Questions for Finders
As noted, most independent film and television financing transactions do not involve registered securities. Therefore, SEC guidance is particularly important to assist in the analysis of whether a person is “engaging in the business of effecting transactions in securities,” in which only registered broker-dealers may engage. The SEC has advised that addressing certain questions can help interested parties determine whether broker-dealer licensure is required.

The first question is: Does the finder participate in important parts of a securities transaction, including solicitation, negotiation, or execution of the transaction? As one attorney has noted, “[A] person loses his or her finder status by taking any role, however minor, in the ultimate sale of securities.”

Several California cases interpret the so-called finder exception to licensure and the role a finder may play in a transaction. Initially, the finder exception was applied by California courts to real estate transactions for which a person without a broker’s license sought a fee from the sale of real estate. However, the finder exception has been considered in matters concerning the sale of securities in cases such as Evans v. Riverside International Raceway and others.

In Evans, the plaintiff sought to recover a commission after the defendant successfully implemented a complicated and detailed financing strategy originally advanced by the plaintiff but with a financing source different from the one that the plaintiff had introduced. The California Court of Appeal affirmed the grant of summary judgment for the defendant. In addition, the court provided a detailed explanation of the finder’s exemption, stating that the finder “merely brings a buyer and seller together so that they make their own contract without aid.” Furthermore, “[a]ny participation, however slight, in the negotiations” brings the finder within the definition of a broker, who must be licensed. The court also explained that a finder may not compel the parties to negotiate a contract. In Zalk v. General Exploration Company, the appellate court validated a finder’s fee agreement and determined that the role of a finder is limited to introducing the buyer and seller of a business to each other through an intermediary and not providing any other services.

At the federal level, similarly limited exemptions to the necessity of broker-dealer registration have been recognized for qualified finders and business brokers. However, this qualified finder exception appears to be limited to narrow circumstances. A collection of SEC “no-action” letters offers additional guidance.

“No-Action” Letters
The SEC issues “no-action” letters to indicate that the SEC will not take any action (or, in the alternative, that the SEC cannot guarantee that it will not take action) against an issuer or interested party in potential violation of a statute or other regulation. In most cases, “no-action” letters are issued by the SEC following a communication from an issuer or interested party seeking direction prior to undertaking certain conduct viewed as potentially violative of federal securities laws.

An important “no-action” letter concerning the federal finder exemption was issued to Paul Anka in 1991. In that matter, he sought relief from broker-dealer registration in connection with fundraising efforts on behalf of a professional hockey team, notwithstanding that he was to be paid a transaction-based fee for his services. In issuing its favorable determination, the commission gave extraordinary weight to the fact that Anka did nothing more than provide names and phone numbers of prospective investors to the issuer. The same rationale for collection of finder’s fees without broker-dealer registration was allowed in a recent bankruptcy proceeding, In re Foundation Group Systems, Inc. In that case, the court held that the finder exemption applied, based largely upon the determination that the individual relying on the exception did not participate in any of the purchase-sale negotiations.

One way to summarize this guidance is that the finder’s “involvement must start and stop with making introductions.” However, this exception is not found in any legislation, and at the federal level the exception is the product of no-action letters. The application of the exception has not always been consistent or clear. Practitioners must therefore recognize that the SEC could reduce or eliminate the exception at any time.

Transaction-Based Compensation
Another question for evaluating the likelihood of a finder’s exemption is whether the finder receives transaction-based compensation. Although a finder’s activities may be limited to introducing potential investors to the issuer, the manner in which the finder is compensated is equally important. As one law journal article has noted: “Most private investment intermediaries will have an arrangement with the issuer to receive transaction-based compensation rather than a flat finder’s fee. Therefore, although courts generally do not find such compensation to be the sole determinant in holding a broker to be unregistered, the SEC hints that such a compensation agreement may be enough to require registration.”

Relevant case law and SEC “no-action” letters recognize that success-based compensation is a primary characteristic of the broker-dealer role. When compensation is based on the outcome of a transaction, it necessar-
ily follows that that those entitled to the compensation “have a powerful incentive to do whatever is necessary to make this transaction succeed.” This creates risk for the investor and a greater public interest in ensuring that the person who profits from the transaction is licensed.

For example, in a “no action” letter to Brumberg, Mackey & Wall, P.L.C. dated May 17, 2010, the SEC denied a law firm’s no-action request to receive transaction-based compensation to help a client raise funds. The SEC determined that the transaction-based compensation, when coupled with the law firm’s intention to introduce the client to persons who “may have an interest” in providing financing to the client, is the “hallmark of broker-dealer activity.” The SEC noted that the firm’s proposed activities likely would involve prescreening potential investors and presenting the client’s securities to attract investor interest. The SEC further added that the firm’s contemplated “receipt of compensation directly tied to successful investments” in its client’s securities by investors introduced by the firm would give the firm a “salesman stake” in the proposed transaction and would create heightened incentive for the firm to engage in sales. In short, if the finder’s compensation is transaction-based, there is a significant risk that the finder exception will not apply and a broker-dealer license will be required under applicable securities laws.

The Finder’s Regular Business

A third question concerns the finder’s business role. Is the finder in the business of effecting or facilitating securities transactions? The more a person is in the business of raising capital, the more likely that person should have a broker-dealer license. The analysis is more difficult when a person occasionally, indirectly, or on occasion participates in capital-raising. However, certain activities generally have been recognized to constitute effecting or facilitating transactions in securities. Among these activities are: 1) identifying potential purchasers or sellers of securities, 2) soliciting or structuring transactions, 3) negotiating terms for transactions, 4) performing due diligence, 5) providing valuations, 6) preparing, conveying, or collecting transaction-related documents, 7) handling funds or securities on behalf of an issuer, and 8) otherwise acting as an intermediary in a transaction.

Nationwide Investment Corporation v. California Funeral Services, Inc. provides a good example of the problems that purported finders may face when they engage in these activities. In Nationwide, the plaintiff sought to receive compensation for its services to the defendant in connection with the defendant’s purchase of another company. Part of the plaintiff’s role was to negotiate the purchase. The appellate court affirmed the grant of summary judgment in favor of the defendant and rejected the plaintiff’s contention that those who represent purchasers of securities, rather than sellers, are not required to be licensed. Instead, the court determined that it did not matter which party the unlicensed person worked with on the transaction. Participation in negotiations for the purchase or sale of securities, the court held, is the role of a broker-dealer. It would be unwise to expect that a court will view occasional participation in such activity with leniency.

Another inquiry asks whether the person regularly handles securities or funds of others in connection with securities transactions. Not surprisingly, the regular handling of securities or the handling of client funds for securities transactions require licensure. While it is true that in its “no action” letter to Anka, the SEC gave considerable weight to the fact that he “had not previously been engaged in arranging financings and represented that he would not do so in the future,” it is also true that in Owen v. Off, the California Supreme Court expressly rejected the position that parties who engage in only a single transaction concerning the sale of securities are exempt from licensure. Under California securities law, there is no exception for parties who engage in broker-dealer activities for just one deal.

Another reason that entertainment industry finders should not rely on the “no action” letter to Anka is that the SEC is now construing the terms “engaged in the business” more narrowly and may conclude that transaction-based compensation alone is sufficient to trigger the broker-dealer registration requirement. As one law review article summarizes: “[A]rguments that referral activities were not the finder’s principal business have also been rejected. In effect, there is no ‘de minimus’ exception from broker-dealer registration.”

Guidance for Issuers

Prospective issuers and finders must therefore proceed with care to limit the activities of any finder who is not a registered broker-dealer, since even a single transaction may violate state and federal securities law. Questions concerning the finder’s role, type of compensation, and regular business are important for entertainment industry players to consider. The SEC and other regulators have increased enforcement against finders who are performing broker-dealer activities without registration. Increased enforcement is likely the result of a downturn in the economy and the flood of scandals in the financial sector, including Enron, Bernie Madoff, Scott Rothstein, and Allen Sanford. The high visibility of the entertainment industry also makes it a target for investigations.

While entertainment industry finders may find themselves under increased scrutiny, it is a safe bet that entertainment financing will continue. Not all parties involved in a securities transaction must be licensed. For example, issuers generally are not considered to be brokers or dealers, because they are not selling third-party securities. Similarly, certain “associated persons” of an issuer—including employees, officers, and directors—may facilitate capital-raising efforts of an issuer without running afoul of broker-dealer registration requirements. At the time of participation, however, these associated persons must not be subject to statutory disqualification under the Exchange Act, must not receive commissions in connection with the raising of capital, cannot be an associated person of a broker-dealer, and must limit their sales activities as set forth in Rule 3a4-1 of the General Rules and Regulations promulgated under the federal statute.

In California, Section 25200 of the Corporations Code similarly provides an exemption to the requirement that broker-dealers be licensed by the commissioner in situations in which the person 1) is registered as a broker-dealer with the SEC, 2) has not previously had a certificate denied or revoked by the commissioner, 3) has no place of business within California, and 4) and does not directly offer to sell or buy in California to a) persons other than broker-dealers, banks, savings and loan associations, trust companies, insurance companies, investment companies registered under the Investment Act of 1940, pension or profit-sharing trusts (other than self-employed individual retirement plans) or other institutional investors or government agencies or instrumentalities, or b) more than 15 customers (whether or not self-employed individual retirement plans) having an existing account with such broker-dealer prior to any offer having been made to them during any period of 12 consecutive months.

Frequently, those who act as entertainment industry finders elect not to become licensed because “registration as a broker-dealer is burdensome and time-consuming process that requires on-going reporting and compliance throughout the year.” In addition, “once registered, broker-dealers must comply with a number of specific conduct, financial responsibility and reporting requirements, and are subject to periodic compliance examinations by the SEC, FINRA and state securities commissions. As such, broker-dealer registration is neither a simple, nor inexpensive undertaking.”

Although a finder’s reluctance to become licensed is understandable, significant adverse
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consequences may arise when finders are used improperly to raise capital for project financing. Finders engaging in activities reserved for registered broker-dealers can subject themselves to regulatory action by the SEC, state regulators, and federal and state courts. Potential consequences may range from “monetary damages and civil injunctions to outright criminal prosecution.”

Also, courts may “order the cancellation or repayment of commissions and fees, injunctions prohibiting future violations of securities laws, and payment of civil and criminal penalties.”

Section 25501.5 of the Corporations Code specifically “gives investors the right to rescind a transaction when an unregistered broker-dealer procures the investment. If the investor no longer holds the securities, he or she may sue for damages as well as collect attorney’s fees, costs, and treble damages amounting to as much as $10,000.” In addition, finders may be unable to enforce their fee arrangements with the issuer and, therefore, may not be able to collect for services rendered. Finders may also be denied future registration with the SEC.

On the issuer side, the potential consequences may be even more debilitating, particularly as they may materially and adversely affect both the issuer’s current capital raising efforts as well as future financing. For example, the involvement of a finder deemed to be an unregistered broker-dealer could jeopardize private placement exemptions relied upon by the issuer or void the investors’ sub-

scriptions, as agreements entered into in violation of the Exchange Act are void. In the process, this may subject the issuer to adverse regulatory action from the SEC and state regulators, including the imposition of fees and penalties.

Investors may have the right to rescind their investments and demand the return of their capital, and the SEC has the right to sanction the issuer by barring it from conducting future exempt offerings. The issuer may have potential liability as an “aider and abettor” of the finder’s securities law violations. Lastly, the associated legal, accounting, and administrative burdens associated with these consequences will undoubtedly be significant and time-consuming.

Given these potential outcomes, it is essential that entertainment companies and producers contemplating using the services of a finder to facilitate capital-raising efforts understand the applicable law and require that the finders engage to follow the law. Among other things, thoughtful consideration should be given to what services actually are needed of the finder, the manner in which the finder will be compensated, and what experience the finder has involving securities transactions. If the finder’s services involve more than mere introductions, the finder should be compensated on a fixed-fee basis, regardless of the outcome of the capital-raising. If services involve more than mere introductions, or if transaction-based compensation is to be paid, or if the finder is frequently involved in securities transactions, thorough diligence should be performed to ascertain whether the finder’s conduct potentially qualifies as conduct reserved for broker-dealers. If so, the finder probably is required to have a license. The entertainment industry may be different, but those who ignore the applicable securities laws when engaging a finder may find that difference involves something other than a painless route to capital.
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THE MOST COMMON LEGAL DISPUTES regarding reality television shows concern 1) state law claims by a plaintiff appearing in or mentioned on a show against the producers and broadcaster of that show, and 2) idea submission claims made by would-be producers of a proposed show against the producers and broadcasters of an actual show. State law claims involving reality television shows include common law and statutory right of publicity claims, defamation, intentional infliction of emotional distress, fraud, trademark infringement, and even violation of civil rights. Much of the recent focus in these cases, however, has been on claims that producers and broadcasters have violated the plaintiffs’ common law or statutory rights of publicity.1

Right of publicity and defamation claims are vulnerable to two First Amendment defenses: transformative use and public interest. The transformative use defense requires a defendant to show that the work is protected by the First Amendment by virtue of containing significant transformative elements or that the value of the work does not derive primarily from the celebrity’s fame. Application of the defense involves a balancing test that requires the court “to examine and to compare the allegedly expressive work with the [use of the plaintiff’s identity] to discern if the defendant’s work contributes significantly distinctive and expressive content.”2 Under this test, when the value of the work comes principally from some source other than the celebrity’s fame “it may be presumed that sufficient transformative elements are present to warrant First Amendment protection,” whereas when an “artist’s skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, then the artist’s right of free expression is outweighed by the right of publicity.”3

Applying this test, a Central District of California court denied a

by WILLIAM ARCHER

REAL

Getting

Reality TV shows continue to be sued by unwilling participants and wannabe producers

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motion that plaintiff Gilbert Arenas, a guard for the Memphis Grizzlies, made for a preliminary injunction against the producers of the reality television show *Basketball Wives* and Arenas's ex-fiancée. The motion sought to prevent them from 1) using the NBA player’s alleged trademarks in association with any reality television show, 2) using “basketball wives” or any other term that would suggest affiliation with basketball players in the title, promotional text, or the show itself, and 3) using any other means to suggest affiliation with basketball players, such as including more than two participants who are known to be affiliated with basketball players.3 Arenas filed the action against Laura Govan and Shed Media US, Inc., which at the time was the production company for the show and a spinoff, *Basketball Wives Los Angeles* (BWLA). When the action was filed, a press release indicated that Govan would appear on BWLA and described her as the sister of Gloria Govan, the fiancée of Los Angeles Lakers player Matt Barnes, and referred to Laura Govan’s four children with Arenas without specifically mentioning Arenas.

Arenas sought the preliminary injunction based upon claims for common law misappropriation of likeness and trademark infringement. In California, a claim for commercial misappropriation requires the plaintiff to prove “(1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of [the] plaintiff’s name or likeness to [the] defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury.”15

It was undisputed that Arenas had not consented to whatever use Shed Media and Govan might make of Arenas’s identity. The court concluded that, given the subject matter of the show, it was likely that Govan would mention Arenas by name on the show in the contexts of their former relationship and his status as a famous basketball player and that her likely on-air conversations about Arenas (and any related promotional materials) would constitute the use of Arenas’s identity as a celebrity.

The court, however, concluded that Arenas was unlikely to succeed on his common law commercial misappropriation claim and therefore was not entitled to a preliminary injunction, because the claim was subject to the transformative use defense. Applying the balancing test, the court concluded that any references in BWLA to Arenas likely would be incidental to the show’s plot as a whole, since the show is about the women who have or have had relationships with basketball players rather than about the players themselves. Accordingly, the court concluded that the transformative use defense probably would defeat Arenas’s misappropriation claim.

The court also concluded that the public interest defense likely would defeat Arenas’s misappropriation claim. Under the public interest defense, “no cause of action will lie for the publication of matters of public importance.”14 While acknowledging that Best’s encounters with the police “involved conduct that was arguably toward the lower end of the spectrum of criminality,” the court nonetheless rejected Best’s argument that her arrest was too de minimis to be a matter of public concern. The court held that the use of Best’s identity was a matter of public concern that fell within IRPA’s exemption from liability for the “use of individual’s identity for non-commercial purposes, including any news, public affairs, or sports broadcast or account, or any political campaign.”13

The court noted that when the government—either directly or through a legal standard that imposes civil liability—imposes sanctions on the publication of truthful information of public concern, “privacy concerns give way when balanced against the interest in publishing matters of public importance.”14 While acknowledging that Best’s date of birth, height, weight, and driver’s license number were not sufficiently intimate or personal to be protected by a constitutional privacy interest, and that brief descriptions of Best’s previous arrests and traffic stops and her driver’s license number were publicly available.

The First Amendment, however, did not bar all of Best’s privacy claims. The court declined to grant summary judgment in favor of A&E and the production companies on her claim that the disclosure of her information violated the DPPA, which creates a private cause of action against a “person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter.”16

Nonbroadcast Conduct

First Amendment defenses also can be lost if the plaintiff bases his or her claims on the nonbroadcast conduct of the defendants. In *Tiwari v. NBC Universal, Inc.*,17 a federal judge in the Northern District of California refused to dismiss or strike federal civil rights claims and a state law intentional infliction of emotional distress claim brought against NBC Universal by Anurag Tiwari.

Producers of the NBC show *To Catch a Predator* used an adult
posing as a teenager to lure Tiwari to a house where, Tiwari alleged, he walked into a garage where approximately half a dozen police officers shouted at him with their guns drawn and aimed at his head, pushed him against a wall, yanked his arms behind his back, handcuffed him, and transported him to the Petaluma airport. There, he was filmed being interrogated in a holding area built by NBC and the police for the episode. According to Tiwari’s complaint, NBC directed and controlled the timing, setting, and conditions under which the police arrested and interrogated him.

Although Tiwari was charged with two felony criminal charges, one was dismissed and Tiwari was arraigned on the other, which the district attorney subsequently dismissed and filed as a single misdemeanor. Tiwari was acquitted of the misdemeanor in 2009 and subsequently charged and convicted of a different misdemeanor. After he appealed, that charge was reduced to an infraction, to which Tiwari pled no contest and for which he paid a $30 court fee. A 2010 broadcast of the show, however, included an epilogue incorrectly stating that Tiwari had been convicted of attempted lewd and lascivious acts with a child.

Tiwari sued NBC for violation of his civil rights, intentional infliction of emotional distress, and defamation. NBC moved to dismiss the civil rights claim and to strike with respect to the intentional infliction of emotional distress and defamation claims. In his civil rights claim, Tiwari alleged that his Fourth Amendment rights were violated because NBC’s actions amounted to a seizure that intruded on his privacy rights, and that the seizure was unreasonable because it was conducted in a manner designed to humiliate Tiwari and had no legitimate law enforcement purpose. NBC moved to dismiss the civil rights claim, contending that NBC’s actions were protected by the First Amendment.

The court denied NBC’s motion to dismiss the Fourth Amendment claim, finding that NBC’s First Amendment defense was mistakenly based on the assumption that Tiwari was seeking “broadcast damages,” whereas Tiwari indicated that he was seeking damages based on NBC’s nonbroadcast conduct alone. The court found that it was plausible that Tiwari suffered damages from NBC’s alleged direction to law enforcement that it arrest Tiwari in a sensational way. The court rejected NBC’s argument that Tiwari could not have an objectively reasonable expectation of privacy at the house of a third party or in the Petaluma airport, finding that, even if there were at best only a minimal privacy interest, Tiwari still could prevail if there were no legitimate purpose served by NBC’s actions.

The court also denied the motion to dismiss with respect to the substantive due process claim, noting that the First Amendment privilege of the media “is not absolute...and as in other areas involving the media, the right of the individual to keep information private must be balanced against the right of the press to disseminate newsworthy information to the public.”

The court also denied NBC’s anti-SLAPP motion to strike with respect to the claim of intentional infliction of emotional distress, finding that Tiwari established a probability of success. In so holding, the court noted that Tiwari’s claim for intentional infliction, like his civil rights claim, appeared to be based on NBC’s production conduct and not on its broadcast of the show. The court also rejected NBC’s argument that Tiwari had failed to allege outrageous conduct on the part of NBC, finding that if NBC did direct the police to arrest him in a dramatic fashion with guns raised when there was no legitimate law enforcement purpose, that act alone might be found outrageous.

The court did, however, grant NBC’s motion to strike with respect to Tiwari’s defamation claim, finding that, viewing the 2010 broadcast in its entirety, the natural and probable effect on the viewer would be no different if the epilogue had reported Tiwari’s conviction correctly. Since the epilogue, taken in context, was substantially true, the court granted the motion to strike with respect to the defamation claim based on the fair report privilege in Section 47(d) of California’s Civil Code, which explicitly protects as privileged media reports of official proceedings that are fair and true. In that respect, Tiwari is more like the typical right of publicity and defamation claims in reality television cases, which often do not prevail against a First Amendment defense.

Idea Submission Claims

Would-be producers of proposed reality television shows have sued the producers and broadcasters of actual shows, on theories of copyright infringement, breach of implied contract, breach of confidence, and unjust enrichment. Copyright infringement claims in these cases are often dismissed at the pleading stage because the nature of reality television makes it particularly difficult for plaintiffs to establish copyright infringement.20

To state a claim for infringement, a plaintiff has to allege ownership of a valid copyright and copying of constituent elements of the work that are original. The second prong requires the plaintiffs to allege that the defendant had access to the plaintiffs’ copyrighted work and that the works at issue are substantially similar in their protected elements. To assess substantial similarity, the court must apply the extrinsic test, which focuses on similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events of the two works. When courts apply the extrinsic test, they must
inquire as to whether the protectable elements, standing alone, are substantially similar. The test requires courts to “filter out and disregard the non-protectable elements in making [the] substantial similarity determination.”22 Substantial similarity “must be measured at the level of the concrete ‘elements’ of each work, rather than at the level of the basic ‘idea,’ or ‘story’ that it conveys.”22

Given that reality shows are supposed to be unscripted, it is unlikely, especially at the pitch phase, that anyone will present more than the basic idea for the show, and in particular it is unlikely that any protectable, concrete elements such as plot, dialogue, or sequence of events will even exist. In other words, it is unlikely that any protectable elements of a submitted reality show could be substantially similar to elements of an allegedly infringing work.

For example, in a case involving the Rachel Ray Show, Jeffrey Zella and Ross Crystal submitted a one-page treatment and a three-page script to the Food Network for a show titled Showbiz Chefs. The Food Network rejected the idea. Three years later, the network launched Inside Dish with host Ray Zella and Crystal sued CBS and others alleging infringement. The court granted a motion to dismiss the complaint with host Ray. Zella and Crystal sued CBS and others alleging infringement. The court granted a motion to dismiss the complaint on the ground that Showbiz Chefs contains no protectable elements and is not substantially similar to Inside Dish.

The court held that “the individual generic elements of cooking shows and talk shows—i.e., a host, guests celebrities, and interview, and a cooking segment”—cannot be protectable elements because “[g]eneral plot ideas are not protected by copyright law.”23 The court noted that the fact that the plaintiffs’ program was unscripted does not alter this analysis, citing Bethea v. Burnett,24 in which the court reviewed the two “plots” of the reality shows C.E.O. and The Apprentice.

The court held that the stock elements of a host, guest celebrities, an interview, and a cooking segment also can be characterized as unprotected scenes a faire, i.e., “situations and incidents which flow naturally from [the] basic plot premise” of a cooking talk show. The court concluded that “the formats of Showbiz Chefs and Rachael Ray may look similar, but so does every talk show to some extent. Extending copyright protection over the generic format of a cooking/talk show would stretch the bounds of copyright law beyond what it was intended to cover.”25

The facts that ideas alone are not copyrightable and that most pitches and submissions for reality shows will contain few, if any, protectable elements that could support a finding of substantial similarity, combined with the scenes a faire doctrine, can make it almost impossible to establish copyright infringement in the reality television idea submission context. This can make the viability of one or more state law claims crucial for the plaintiff suing based on a reality television idea submission.

**Desny Claims**

In California, the most promising candidate for state law claims in idea submission cases is the Desny claim for breach of implied contract. In Desny v. Wilder,26 actor Victor Desny sued director and producer Billy Wilder and Paramount Pictures alleging that in 1949 Desny had submitted an idea to Wilder for a movie that Wilder later used for his film Ace in the Hole. The trial court granted summary judgment in favor of Wilder and Paramount, but the California Supreme Court reversed, holding that if an “idea purveyor has clearly conditioned his offer to convey the idea upon an obligation to pay for it if it is used by the offeree and the offeree, knowing the condition before he knows the idea, voluntarily accepts its disclosure...and finds it valuable and uses it, the law will either...hold that the parties have made [a] contract, or...imply a promise to compensate.”27

Twenty years after the California Supreme Court’s decision in Desny, Congress passed the Copyright Act of 1976. The act preempts “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright...and come within the subject matter of copyright.”28 Thus, there is a two-pronged test pursuant to which the act preempts a particular state law claim when 1) the work at issue comes within the subject matter of copyright, and 2) the rights granted under state law are equivalent to any of the exclusive rights within the general scope of copyright set forth in the act.29 To avoid preemption under the latter prong, “the state claim must protect rights which are qualitatively different from the copyright rights. The state claim must have an ‘extra element’ which changes the nature of the action.”30 The Copyright Act of 1976 requires courts to address whether it preempts Desny claims, and a series of federal court decisions hold that Desny claims are preempted.31

In 2004, however, the Ninth Circuit held in Grosso v. Miramax Film Corporation that some idea submission claims are not preempted by the U.S. Copyright Act.32 In that case, Jeff Grosso sued Miramax for breach of implied contract under California law and copyright infringement, alleging that Miramax stole the ideas and themes of his poker screenplay The Shell Game when it made the poker movie Rounders. The Ninth Circuit held that the district court improperly dismissed Grosso’s state law claim for breach of implied contract. Relying primarily upon Desny, the Ninth Circuit explained that if a plaintiff furnished an idea to another person, a contract can be implied in fact, even in the absence of an express promise to pay if the plaintiff prepared the work, disclosed it to the other party for sale, and did so under circumstances from which it could be concluded that the other party voluntarily accepted the disclosure knowing the conditions on which it was disclosed and the reasonable value of the work. The court held that the plaintiff’s claim for breach of implied contract satisfied that test and therefore was not preempted by federal copyright law.33

Four years later, the same court decided Montz v. Pilgrim Films & Television, Inc. (Montz I).34 In that case, Larry Montz conceived an idea for a reality television show that would follow a team of paranormal investigators as they conducted field investigations. Montz alleged that, from 1996 to 2003, he and plaintiff Daena Smoller pitched Montz’s idea to networks and producers, including NBC and the Sci-Fi Channel, which passed on the project. (The channel has since changed its name to SyFy.) According to the complaint, after meetings with Montz and Smoller, NBC Universal partnered with Craig Piligian and Pilgrim Films & Television, Inc., to produce Ghost Hunters on the Sci-Fi Channel.

Montz alleged copyright infringement as well as several state law claims including breach of implied-in-fact contract and breach of confidence. The complaint alleged that plaintiffs “communicated their ideas and creative concepts for the ‘Ghost Hunters’ Concept” to the defendants. The complaint further alleged that the plaintiffs presented their ideas to the defendants “for the express purpose of offering to partner with the Defendants in the production, broadcast and distribution of the Concept” and that the plaintiffs, accordingly, “expected to receive a share of any profits and credit.”35

The District Court dismissed the complaint and, in Montz I, the Ninth Circuit affirmed the dismissal on preemption grounds viewing Montz’s case as distinguishable from Grosso. In particular, the court viewed the breach in Grosso as violating the plaintiff’s right to payment on a sale, whereas it viewed the breach of the alleged agreement in Montz as violating “the plaintiffs’ exclusive rights to use and to authorize use of their work—rights equivalent to those of copyright owners under §106.”36 The court found that the plaintiffs’ expectation of profits and credit “was premised on the fact that they would retain control over their work, whether in partnership with the defendants or not” and that their right to receive a share of the profits and credit was “thus merely derivative of the rights fundamentally at issue: the plaintiffs’ exclusive rights to use and to autho-
rize use of their work.” Thus, the court concluded that the rights asserted by the plaintiffs were equivalent to the exclusive rights protected by copyright, and the claim was therefore preempted by the Copyright Act.37

Montz I appeared to signal the end of Desny claims in cases in which plaintiffs allege that they had sought not just to sell ideas but to “partner” with the recipient in the production and receive a share of the profits. As that virtually always will be the case when a producer is pitching ideas, Montz I was a significant victory for studios and networks, as well as production companies that typically receive idea submissions rather than make them.

In Montz II, however, an en banc panel found no meaningful difference between the conditioning of use on payment (as occurred in Grosso) and conditioning use on the granting of a partnership interest in the proceeds of the production (as alleged by Montz).38 Accordingly, Montz II holds that the Desny claim was not preempted by the Copyright Act. In so holding, the court viewed itself as reaffirming the rule in Grosso that “copyright law does not preempt an implied contractual claim to compensation for use of a submitted idea.” The court repeated its observation from an earlier case that “[c]ontract law, whether through express or implied-in-fact contract, is the most significant remaining state law protection for literary or artistic ideas.”40 Given the extreme difficulty of establishing copyright infringement in the context of submissions for reality television shows, one could argue that Desny claims are virtually the only remaining protection for those submitting ideas.

The industry, however, frequently makes adjustments in response to new law. After Montz II, many screenwriters and independent producers are finding it even more difficult than before to submit ideas to studios, networks, and production companies without being required to sign a submission release agreement that effectively waives any right to assert Desny claims. Moreover, courts in other circuits do not always agree with Montz II regarding the preemption of an implied contract.41 This issue may ultimately be decided by the Supreme Court.

Reality television idea submission issues sometimes hinge not on Desny implied contract claims but on express contracts that alter the common law rights and obligations of the parties. These contracts typically consist either of nondisclosure agreements intended to protect those submitting their ideas or submission release agreements intended to protect those who receive the ideas. Absent significant leverage or an existing relationship, most would-be producers, particularly after Montz II, will find it diffi-
cult to submit their projects to a network without signing a submission release agreement and will find it virtually impossible to get a network or established production company to sign a nondisclosure agreement.


5 Id. at 17 (quoting Stewart v. Rolling Stone LLC, 181 Cal. App. 4th 664, 679 (2010) (quoting Eastwood v. Crichton, 761 F. 2d 1289, 1293 (9th Cir. 1985)).


7 Id. (quoting Downing v. Abercrombie & Fitch, 265 F. 3d 994, 1001 (9th Cir. 2001) (quoting Eastwood v. Superior Court, 149 Cal. App. 3d 409, 417 (1983))).

8 Id. at 16 (quoting Hilton, 599 F. 3d at 912).

9 CODE CIVIL. PROC. ¶425.16.


11 765 ILL. COMP. STAT. 1075-30.

12 765 ILL. COMP. STAT. 1075-5.

13 765 ILL. COMP. STAT. 1075-35(b)(2).


15 Id. at 758.


18 Id. at *22 (quoting Gilbert v. Medical Econics Co., 665 F. 2d 305, 307 (10th Cir. 1981)).


21 Funky Films, Inc. v. Time Warner Emm’l Co., 462 F. 3d 1072, 1077 (9th Cir. 2006); See also Cavalier v. Random House, 297 F. 3d 815, 822 (9th Cir. 2002); Williams v. Crichton, 84 F. 3d 581, 588 (2d Cir. 1996).


23 Zella, 529 F. Supp. 2d at 1133-34 (quoting Berke v. Crichton, 761 F. 2d 1289, 1293 (9th Cir. 1985)).


25 Zella, 529 F. Supp. 2d at 1135.

26 See Desny v. Wilder, 46 Cal. 2d 715 (1956).

27 Id. at 719.


29 Del Madera Props. v. Rhodes & Gardner, Inc., 820 F. 2d 973, 976 (9th Cir. 1987).

30 Id. at 977.


32 Grosso v. Miramax Film Corp., 383 F. 3d 965, 968 (9th Cir. 2004).

33 Id.

34 Montz v. Pilgrim Films & Television, Inc. (Montz I), 607 F. 3d 1153 (9th Cir. 2010).

35 Id. at 1158.

36 Id.

37 Id.


39 Id. (quoting Benay v. Warner Bros. Entm’t, Inc., 607 F. 3d 620, 629 (9th Cir. 2010)).

Rules of ENDORSEMENT

Attorneys can use case law and the FTC guides to steer celebrity clients toward a safe harbor for endorsements made on social media

As advertisers, marketers, and celebrity endorsers find new ways to spread their commercial messages via social and new media, legal advisers must be cognizant of how the Federal Trade Commission has applied its revised Guides Concerning the Use of Endorsements and Testimonials in Advertising. These guides provide instruction to advertisers and endorsers for voluntarily compliance with Section 5 of the FTC Act as it applies to endorsements and testimonials. The FTC originally published a proposed set of guides in 1972. In 1980 the commission finalized the guides, and it updated them in 2009 to address the growing use of social media as a vehicle for commercial speech. A number of the changes directly affect celebrity endorsers.

For example, while it has always been the law that advertisers can be held responsible for false and misleading advertising, the revised guides expressly place celebrities on notice that they also may be liable for statements made in their endorsements. Enforcement actions have been brought against celebrities in the past, and the FTC has alerted paid endorsers and their counselors to this potential risk in the revised guides. The warning particularly applies in situations in which the connection between the advertiser and celebrity may be unclear to consumers.

The FTC has acknowledged, however, that “well-known persons can appear in advertising without being deemed endorsers.” Thus, to determine liability, the threshold question becomes: Is the celebrity an endorser or a paid actor? The revised guides define an endorsement as “any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness, or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the well-known persons.”

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the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser.”

Whether the celebrity is an endorser or paid actor depends upon the probable beliefs of consumers as determined on a case-by-case basis. For example, as illustrated in the guides, if a celebrity suggests he or she is a satisfied customer of a product in an infomercial, a significant percentage of consumers will likely believe that those statements represent the celebrity’s own views, even if the celebrity is reading from a script. On the other hand, consumers would likely understand that an athlete performing voice-overs in an insurance commercial is merely a paid actor, not an endorser, as there is no nexus between the athlete’s profession and the product and no suggestion that the athlete is a user of the product.

When a celebrity is in fact an endorser, the endorsement must “reflect the honest opinions, findings, beliefs, or experience of the endorser.” While not required to become experts on a product or industry, the celebrity, if reading from a script, may have an obligation to make reasonable inquiries of the advertiser to confirm that there is an adequate basis for assertions the script has them making. This may include requesting substantiation for product claims made in the advertising campaign and requesting samples of the product for personal use. In essence, the celebrity should not ignore signs that claims made about a product appear to be false or misleading.

In the event an advertisement represents the celebrity uses the endorsed product, the endorser must be or have been a bona fide user at the time the endorsement was given. For example, it would be misleading for Kobe Bryant to regularly wear Reeboks on the basketball court but appear in a Nike commercial as an endorser. Once an endorsement is secured, the advertiser should consider periodically checking that the celebrity’s opinions remain the same, as an “advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product.”

Once an endorsement is secured, the advertiser should consider periodically checking that the celebrity’s opinions remain the same, as an “advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product.”


tried the leading acne medications at our house, and nothing ever seemed to work until our girls met a Beverly Hills doctor and got some real help through a product she developed called Acne-Statin.”

In 1978, the FTC accused the manufacturer, the advertising agency, and Boone of participating in false and misleading advertising, charging that the product would not cure acne as the ad implied and that the parties lacked substantiation to support any such claims. The FTC noted that Boone, in return for his endorsement, received a share of the product’s sales. Boone eventually signed a consent order, agreeing to stop appearing in the ads and pay up to $5,000 in restitution into a fund to compensate customers who were misled. Commenting on the order, the FTC stated that celebrities must “verify the claims made in any commercial before it appears, hiring reliable independent analysts to study them if the star has no expertise in the subject.”

This action, the first to hold a celebrity accountable for a misleading endorsement, was a major shock to other celebrities who endorsed products, prompting many to demand indemnification clauses in their endorsement contracts. At the time, many felt that the FTC was out to establish a general rule of enforcement against celebrities.

Actor, not an endorser, as there is no nexus between the athlete’s profession and the product and no suggestion that the athlete is a user of the product.

Venerable singer and actor Pat Boone made history as a celebrity endorser. In the 1970s, Boone appeared in a number of advertisements on behalf of an acne product called Acne-Statin. In one commercial, Boone can be seen sitting next to his daughter Debbie proclaiming, “With four daughters, we’ve
MCLE Test No. 214

The Los Angeles County Bar Association certifies that this activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour.

1. The Guides Concerning the Use of Endorsements and Testimonials in Advertising were first finalized by the FTC in 1972.
   True. False.

2. The guides are binding law.
   True. False.

3. Celebrities may be directly liable for statements they make in advertising.
   True. False.

4. Celebrities may be directly liable for their statements made in advertising, even if they are simply reading from a script.
   True. False.

5. Celebrities are not required to research or make inquiries regarding claims they make in advertising.
   True. False.

6. The guides were revised by the FTC in 2009, in part to address the rising use of social media.
   True. False.

7. Celebrities never have an obligation to use the products they endorse.
   True. False.

8. The FTC’s enforcement activities focus on advertisers, not endorsers.
   True. False.

9. Beginning in 2009, the FTC increased its enforcement activity against celebrities, particularly in the area of social media.
   True. False.

10. It is the advertiser’s responsibility to advise a celebrity in advance about the need to disclose their material relationship in the course of an interview or on social media.
    True. False.

11. Pat Boone was acquitted for statements he made endorsing the Acne-Statin product because the FTC could not prove he was a direct participant under the principles of endorser liability.
    True. False.

12. The 2009 guides clarify that all well-known persons in advertising are liable for statements made during the course of advertisements.
    True. False.

13. Whether a celebrity is an endorser or merely a paid actor depends upon the compensation and indemnification provisions in the celebrity’s contract with the advertiser.
    True. False.

14. The Ninth Circuit held that Steve Garvey was not liable for statements he made as a paid endorser for the product Enforma, in part because the FTC failed to prove that Garvey lacked substantiation for his claims.
    True. False.

15. The rapper 50 Cent and the actor Ashton Kutcher were charged by the SEC and FTC for allegedly failing to disclose material connections to advertisers in statements they made via Twitter.
    True. False.

16. The FTC’s recent enforcement action against Dannon yogurt was for allegedly exaggerating the health benefits of its products, also named its spokesperson, Jamie Lee Curtis, as a defendant for her on-camera statements.
    True. False.

17. Celebrity endorsers may be liable for what they do not say.
    True. False.

18. An NFL football player participating in an interview is not required to disclose to the audience that he is being paid to wear the clothes of an athletic wear company.
    True. False.

19. Once an endorsement is secured, the advertiser should consider periodically checking that the opinions of the celebrity about the product remain the same.
    True. False.

20. An actor performing a voice-over in a commercial is always required to disclose to the audience that he or she is an endorser of the product.
    True. False.

MCLE Answer Sheet #214

RULES OF ENDORSEMENT

Name ____________________________

Law Firm/Organization ____________________________

Address ____________________________

City ____________________________ State/Zip ____________________________

E-mail ____________________________ Phone ____________________________

INSTRUCTIONS FOR OBTAINING MCLE CREDITS

1. Study the MCLE article in this issue.

2. Answer the test questions opposite by marking the appropriate boxes below. Each question has only one answer. Photocopies of this answer sheet may not be enlarged or reduced.

3. Mail the answer sheet and the $20 testing fee ($25 for non-LACBA members) to:
   Los Angeles Lawyer
   MCLE Test
   P.O. Box 55020
   Los Angeles, CA 90055

Make checks payable to Los Angeles Lawyer.

4. Within six weeks, Los Angeles Lawyer will return your test with the correct answers, a rationale for the correct answers, and a certificate verifying the MCLE credit you earned through this self-assessment activity.

5. For future reference, please retain the MCLE test materials returned to you.

ANSWERS

Mark your answers to the test by checking the appropriate boxes below. Each question has only one answer.

1. [ ] True [ ] False

2. [ ] True [ ] False

3. [ ] True [ ] False

4. [ ] True [ ] False

5. [ ] True [ ] False

6. [ ] True [ ] False

7. [ ] True [ ] False

8. [ ] True [ ] False

9. [ ] True [ ] False

10. [ ] True [ ] False

11. [ ] True [ ] False

12. [ ] True [ ] False

13. [ ] True [ ] False

14. [ ] True [ ] False

15. [ ] True [ ] False

16. [ ] True [ ] False

17. [ ] True [ ] False

18. [ ] True [ ] False

19. [ ] True [ ] False

20. [ ] True [ ] False
After obtaining a consent order from Boone, however, the FTC withheld from bringing another action against a celebrity until 2000, when it filed suit against Steve Garvey, a former first baseman for the Dodgers, in connection with his appearance as a paid spokesperson in infomercials for weight loss supplements sold as the Enforma System.29 During the infomercial, Garvey told the audience that “with Enforma you trap the fat from food before it can go to your waistline,” that “it’s all natural, safe, and it works,” and that it enables users “to enjoy all those delicious foods that you crave without the guilt while losing weight.”30

The FTC’s complaint alleged that Garvey, serving as a paid endorser for the Enforma System, undertook deceptive acts or practices in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.31 In affirming the decision of the district court, however, the Ninth Circuit in 2004 held that Garvey was not personally liable or liable as an endorser. In its decision, the court explained that Garvey theoretically could be held liable either as a “direct participant” in the making of false advertising claims or under the principles of endorser liability. To hold Garvey liable for restitution as a direct participant, the FTC had to prove that he had actual knowledge of the material misrepresentations, was recklessly indifferent to the truth or falsity of a representation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth.32

The court found that the FTC did not meet its burden in showing that any of the three elements were met, noting that Garvey and his wife used the system and lost 8 and 27 pounds respectively, Garvey reviewed two booklets containing substantiation materials for the product, and he spoke with several individuals who had experienced positive results using the product.33 The court held that this substantiation “was sufficient—at least for someone in Garvey’s position—to avoid participant liability.”34

With respect to the endorser liability prong, the FTC premised its theory of liability on the guides.35 The Ninth Court observed that the guides were not binding law, but even if they were, Garvey would not be liable under them.36 For one thing, the FTC failed to prove that Garvey provided a true “endorsement” as defined in the guides; i.e., an advertising message that consumers were likely to believe reflected the opinions, beliefs, or findings of a party other than Enforma.37

The court also held that the FTC failed to prove that Garvey’s statements lacked substantiation, explaining that his claims “that he and his wife lost a certain number of pounds clearly pass any substantiation requirement for celebrity endorsers.”38

Five years after the Garvey defeat, the FTC published the revised guides.39 Not surprisingly, in its notice announcing adoption of the revised guides, the FTC made clear that Garvey did not foreclose “participant” liability for celebrities.40 Perhaps with Garvey in mind, the FTC specifically noted that a celebrity reading a script should not be granted immunity from liability for misrepresentations made in the course of that endorsement. The FTC wrote: “The celebrity has decided to earn money by providing an endorsement. With that opportunity comes the responsibility for the celebrity or his or her legal representative to ensure in advance that the celebrity does not say something that does not reflect his or her honest opinions, findings, beliefs, or experience.”41

Current Enforcement
Actor, comedian, and entrepreneur Ashton Kutcher was the first person to reach one million followers on Twitter in 2009. Since that time, he has used his Twitter handle (which now has nearly nine million followers) to promote causes. Among celebrities employing new media, he may be the savviest, yet he recently drew criticism in the media and the attention of the FTC after he guest-edited an online version of Details magazine that was initially released through Facebook, Twitter, Flipboard, and Tumblr.42 Of the 12 technology companies that were profiled in the magazine as recommended products, it was later revealed that eight are his investments and at least two others have business entanglements with the actor.43 The only disclosure of such material connection could be found in the introduction on the first page, which read, “And as an investor, he puts his money where his mouth is, backing many of the companies he champions here.”44

After the magazine’s release, Richard Cleland, assistant director of the division of advertisers of the FTC, stated: “The commenters are correct…that an advertiser does not have control over what a celebrity says in an interview. Nor can the advertiser prevent the producers of that program from editing out of the final version of the interview a disclosure that would have been sufficient to inform viewers of the celebrity’s contractual relationship with the advertiser. However, if the advertiser has decided that it is advantageous to have the celebrity speak publicly about its product or service, the Commission believes that the advertiser has the concomitant responsibility to advise the celebrity in advance about what he or she should (and should not) say about that product or service, and about the need to disclose their relationship in the course of the interview. Evidence that the advertiser did so would provide a strong argument for the exercise of the commission’s prosecutorial discretion in the event the celebrity failed to disclose his or her relationship with the advertiser or made unauthorized claims about the advertiser’s product, or if the celebrity properly disclosed the relationship but that disclosure was ultimately

...
edited out of the program. Because the commission considers each advertisement on a case-by-case basis, the particular facts of each situation would be considered in determining whether law enforcement action would be appropriate.53

Further guidance is found in the FTC’s FAQ for the guides, titled The FTC’s Revised Endorsement Guides: What People Are Asking.54 In response to the question, “Are you monitoring bloggers?” the FTC’s reply states: “We’re not monitoring bloggers and we have no plans to. If concerns about possible violations of the FTC Act come to our attention, we’ll evaluate them case by case. If law enforcement becomes necessary, our focus will be the advertisers, not endorsers—just as it’s always been.55

In short, despite the FTC’s bold proclamation that “endorsers also may be liable for statements made in the course of their endorsements,”56 the burden of the burden appears to remain with the advertiser to ensure compliance with the guides. To illustrate this approach, the recent FTC enforcement action against Dannon for claims that allegedly exaggerated the health benefits of its Activia yogurt and DanActive dairy drink in a marketing campaign featuring actress Jamie Lee Curtis.37 According to the FTC’s complaint, Dannon claimed that DanActive prevents colds and the flu, and that one daily serving of Activia relieves temporary irregularity and helps with “slow intestinal transit time.”58 Featured in the television advertisements for Activia, Jamie Lee Curtis tells viewers that many people suffer from irregularity, that “our busy lives sometimes force us to eat the wrong things at the wrong time,” and she reassures viewers that Activia can help.

Dannon eventually settled with the FTC agreeing to modify their advertising campaigns and pay $21 million to 39 states to resolve their respective state attorney general investigations.59 Curtis’s name, however, was conspicuously absent from the FTC’s complaint, and no liability was extended to her for the statements she made in Dannon’s complaint, and no liability was extended to her for the statements she made in Dannon’s complaint, and no liability was extended to her for the statements she made in Dannon’s complaint.

### The Future of Celebrity Endorsement Enforcement

Marketers certainly know how important it is to include a morals clause in their celebrity contracts, which permits the advertiser to terminate the relationship when the celebrity commits a crime or engages in offensive or immoral behavior that reflects poorly on the company. But this traditional morals clause, by itself, may be insufficient to protect the advertiser in light of today’s emerging social media industry (and the troubles it can get celebrities into with the FTC and the revised guides). As recommended in the guides, marketers and their legal representatives should monitor celebrity client endorsements and advise a celebrity client in advance about what he or she should (or should not) say about the product or service. They should also consider including expanded indemnification and representation and warranty clauses in celebrity contracts. Novel contractual protections, such as a so-called social media etiquette clause governing the use of social media, may also be appropriate.

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4. 16 C.F.R. §235.1(d).
7. *Id.*
9. 16 C.F.R. §235.0(b) (2009).
10. *Id.* at §235.1(a) (Example 4).
11. *Id.* at §235.1(a).
15. *Id.*
16. *Id.* at §235.5.
20. *Id.* at §235.14.
22. *Id.* On Twitter, the FTC has indicated that a simple hashtag following the tweet, such as #paid ad or #ad, will likely suffice. See FTC Facts for Business: The FTC Revised Endorsement Guides: What People are Asking, available at http://business.ftc.gov/documents/ba71-ftcs-revised-endorsement-guideswhat-people-are-asking.
23. *Id.*
24. *Id.* at §316.
25. *Id.* at §319.
27. GENELLE BELMAS & WAYNE OBERBECK, MAJOR PRINCIPLES IN MEDIA LAW 584 (Wadsworth Cengage Learning 2012).
29. FTC v. Garvey, 383 F. 3d 891 (9th Cir. 2004).
30. *Id.* at 895.
31. *Id.* at 896; 15 U.S.C. §54(a), 52.
32. Garvey, 383 F. 3d at 900.
33. *Id.* at 901.
34. *Id.* at 902.
35. *Id.* at 903.
36. *Id.* at 904.
38. Garvey, 383 F. 3d at 905.
41. *Id.* at §235 (citing 16 C.F.R. §235.1(a)).
43. *Id.*
44. *Id.*
46. *Id.*
49. *Id.*
51. *Id.*
53. *Id.*
55. *Id.*
57. *Id.*
59. *Id.*
60. *Id.*
Lawsuits claiming libel in fiction are decided on the basis of whether the work is “of and concerning” the plaintiff

THE CREATORS OF FICTION—including the writers of novels, television shows, and movies—often are inspired by real-life people and events. Current events present some of the most fertile ground for fictional works of entertainment, and pretending that our teachers, neighbors, and acquaintances are nefarious villains often leads to some of the best works.

However, as entertainers as diverse as Sacha Baron Cohen and the producers of *Law & Order* can attest, the label of “fiction” on a work does not guarantee that a libel-in-fiction claim will not be brought. They, as well as a host of others, have been sued when a plaintiff alleges that a fictional character contained in a “fictional” work is really him or her and that the character really defames him or her by falsely describing the individual in a negative manner.

To date, most of the reported libel-in-fiction cases have been filed in California and New York courts. Those courts use the same general approach to these claims, one that first focuses on the question of whether the work at issue is “of and concerning” the plaintiff.\(^1\) Whether the plaintiff was the model or inspiration for a character is not the test. Rather, the plaintiff must demonstrate that, although the work is fictional, people who know the plaintiff understand that the character depicts him or her.\(^2\)

Not surprisingly, the question of whether a work is of and concerning a real individual is not a bright-line rule but, instead, the application of the test has varied across the reported cases. In the process, courts have rejected most libel-in-fiction claims either at the pleading stage or on summary judgment. Even in the absence of a bright-line rule, the cases in which claims have been rejected, along with those few in which the claimants have proceeded to trial and prevailed, provide certain guideposts for practitioners to assist in advising their clients who create, produce, or distribute entertainment content that is
based upon or inspired by true events or real people.

As with many entertainment lawsuits in recent years, a claim against actor Sacha Baron Cohen leads the way. In Doe v. Channel Four Television Corporation, a child-

hood friend of Cohen sued after being iden-
tified by name during an episode of Da Ali G Show, a satirical television show in which Cohen portrays Ali G, a wannabe gangsta rapper who stages spoof interviews with unsuspecting guests. In one episode, Ali G interviewed Gore Vidal, during which Ali G went off on a tangent about the plaintiff, calling her a “bitch” and a “minger” (British slang for an unattractive woman) and claiming that he broke up with her after getting her pregnant. The statements were made amidst a host of other overtly absurd remarks, including that Denzel Washington “lived in George Washington’s former Mount Vernon home,” that “the world is running out of gravity,” and that Ali G’s face had been added to Mount Rushmore.

The woman sued Cohen, HBO, and Channel Four Television for libel, among other things. The trial court granted the defendants’ motion for summary judgment, finding that:

No reasonable person could consider the statements made by Ali G on the Program to be factual. To the contrary, it is obvious that the Ali G character is absurd and all his statements are gibberish and intended as comedy. The actor, Sacha Baron Cohen, never strays from the Ali G character, who is dressed in a ridiculous outfit and speaks in an exaggerated manner of a rap artist. Ali G’s statements are similarly absurd. Altogether, the Program is obviously a spoof of a serious interview program. No reasonable person could think otherwise.4

The California Court of Appeal agreed, finding that, under the totality of the circumstances surrounding the statements, they could not be defamatory.5

Just a year after the Cohen case was decided, the U.S. District Court for the Central District of California rejected a defamation claim brought by Jeffrey Sarver, who alleged that his personal experiences in the military were the bases for the movie The Hurt Locker. In Sarver v. The Hurt Locker LLC, Sarver alleged that he was defamed by several statements in the film that “falsely portrayed [him] as a bad father, a man who had no respect or compassion for human life who was fascinated with the thrill of war and death, and a soldier who violated military rules and regulations.”6

The district court held that there were two principal defects in Sarver’s defamation claim. First, the court held that no reasonable person could believe that the fictional character in the movie, named Will James, depicted the real Jeffrey Sarver. Second, the court emphasized the difference between Sarver’s and the character’s names, as well as the disclaimer at the opening of the film which declared it a work of fiction.7

In the same year as the Sarver case, the California Court of Appeal directed the trial court to dismiss a defamation claim brought by two individuals whose real names were used in a draft script and casting synopses for an episode of CSI. The plaintiffs in Tamkin v. CBS Broadcasting Inc.8 Scott and Melinda Tamkin, were Los Angeles real estate agents who had represented the seller of a home for which one of the writers for CSI had made an offer. The casting synopses for the episode referred to Scott Tamkin as a “hard-drinking extensive bondage/porn-watching man who’s been a mortgage broker since college.” Scott’s wife, Melinda, was described as an “attractive, athletic real estate agent” who supposedly dies during an episode of kinky sex.

The Tamkins sued CBS for defamation after the casting synopses were leaked and posted on several Internet sites—although the names of the characters were changed to Scott and Melinda Tucker before the episode aired. The Tamkins claimed that a number of the statements that appeared in the casting synopses and the episode itself were defamatory, including those that concerned Scott Tamkin’s sex life and Melinda Tamkin’s fictional death.9

CBS filed an anti-SLAPP motion, arguing that the creation of CSI was protected under the First Amendment and that the Tamkins could not prove that a reasonable viewer would believe that the CSI characters were, in fact, an actual portrayal of the Tamkins. The trial court denied the motion, holding that the creation of entertainment programming was not protected by the First Amendment, and thus never addressed whether a reasonable viewer would believe that the Tuckers were the Tamkins. CBS appealed.

The California Court of Appeal reversed, finding that the creation of entertainment programming was a protected First Amendment activity. It then went on to hold that no reasonable person who read the casting synopses or viewed the CSI episode could have understood the characters portrayed in the episode to be the plaintiffs.11 In other words, the statements were not “of and concerning” the plaintiffs.12 Although the names of the fictional characters matched those of the plaintiffs (at least in the synopses), the real Scott Tamkin was not a mortgage broker, the real Tamkins shared only the most general physical similarities to the fictional couple, and there were no biographical refer-

ences in the synopses (such as birthplace, parents, or schools) that would have suggested to a reasonable person that the fictional characters were, in fact, the Tamkins. In the absence of any uniquely identifiable traits that were shared by both the fictional characters and the real Tamkins, the court held that the Tamkins could not meet their burden of establishing a probability that they would prevail on the merits of their claims and dismissed the case.13

New York Cases

Like the Cohen, Hurt Locker, and Tamkin cases, a majority of the libel-in-fiction cases filed in New York have been unsuccessful. In 1982, for example, the New York Supreme Court, Appellate Division, dismissed a case on summary judgment even though the author of the novel State of Grace had told the plaintiff that some of the characteristics of his book’s character were “loosely patterned” on her. In Springer v. Viking Press,14 not only were the plaintiff and the author well acquainted, but the plaintiff and the character also had the same first name (Lisa), both had graduated from college, and both had lived on the same street. The dispute arose because the book also referred to the character as a “whore” who engaged in various types of abnormal sexual activity.

Notwithstanding these similarities, the court dismissed the defamation claims as a matter of law.15 The court found that the alleged similarities were “in large part superficial,” and that the “dissimilarities” between the plaintiff and the fictional character “negate[d] any suggestion” that the plaintiff was the person identified in the work. In particular, the court noted that the plaintiff was a college tutor, while the character in the book was a wealthy prostitute. The court explained that “the dissimilarities both in manner of living and in outlook are so profound that it is virtually impossible to see how one who has read the book and who knew [plaintiff] could attribute to [plaintiff] the life-style of [the character in the book].”16

The court also noted, in dicta, that if the work clearly states that it is a work of fiction, such a disclaimer can assist in showing that the fictional work is not libelous.

The same fate greeted the plaintiff in a 1991 case involving the novel Disappearing Acts, in which the New York Supreme Court granted a motion to dismiss the libel-in-fiction action. In Welch v. Penguin Books USA, Inc.,17 the plaintiff sued the publishers of the novel, claiming that its fictional character resembled him. The plaintiff and defendant author knew each other, and the plaintiff and defendant were physically similar (both were six feet, four inches tall, 225 pounds, with dark complexions and dark hair), both
had dropped out of high school but had obtained equivalency diplomas, both enjoyed carpentry and Scrabble, both had been employed as construction workers, both owned a fish tank, both liked the same breakfast food, both drip dried after a morning shower, both had a trick knee, both were the only son in a family with three kids, and both met their girlfriends while rendering carpentry services at their respective apartments. Moreover, the defendants did not deny that the “plaintiff might have served as an inspiration or model for the character.”

Notwithstanding these similarities, the court dismissed the defamation claims, stating that, when dealing with a fictional work, the plaintiff must overcome “a fictional work’s presumption that all the material is untrue”—that is, “the presumption of invention must be overcome.” As such, the court held that “the identity of the real and fictional personae must be so complete that the defamatory material becomes a plausible aspect of the real life plaintiff or suggestive of the plaintiff in significant ways.” Although the court recognized the similarities between the plaintiff and the fictional character, it found that the emotionally unbalanced character in the novel bore little resemblance to the plaintiff. The court also found that, even though the plaintiff may have been the model or inspiration for the fictional character, the defamatory statements created such a profound “characterological alteration of plaintiff” that no reasonable reader could possibly attribute the defamatory aspects of the character to the plaintiff.

In 2003, the Supreme Court of New York, New York County, dismissed a libel-in-fiction case on summary judgment concerning a character in Primary Colors, a fictional book admittedly based on Bill Clinton’s first presidential campaign. In Carter-Clark v. Random House, Inc., the plaintiff claimed that people she knew who read the book believed that one of the characters in the book was based upon her, and that the character had apparently engaged in sexual activity with the Clinton character while he was running for president.

In harmony with the Springer and Welch cases, the court held that the similarities between the plaintiff and the character in the book were inadequate for the reader, even one who knew the plaintiff, to reasonably believe that the character in the book was “of and concerning” the plaintiff. The court also seemed persuaded by the disclaimer on the book, stating that, “[t]hough not necessarily determinative, ‘Primary Colors’ styled itself as a work of fiction,” and the author’s note stated, “None of these events ever happened.” The court acknowledged that although fiction writers often ground their works in part on people and experiences from their own lives, the essence of what they write is fictional.

**Plaintiff Decisions**

Notwithstanding the outcomes in most libel-in-fiction cases filed in California and New York, a handful of cases have survived the pleading and summary judgment stages. These cases provide additional guidance.

A California case, Bindrim v. Mitchell, is particularly interesting since it proceeded to trial, the plaintiff prevailed on his defamation-by-fiction claim, and the appellate court affirmed the jury verdict against the author and publisher on the libel count as well as an award of punitive damages against the publisher. In 1966, the Second Circuit Court of Appeals reversed a grant of summary judgment in a libel-in-fiction case. In Fetler v. Houghton Mifflin Company, the plaintiff alleged that the main character in a novel contained a libelous portrayal of him. The only issue on appeal was whether or not the plaintiff could show sufficient evidence that the statements in the book were “of and concerning him” sufficient to withstand summary judgment—that is, whether the plaintiff had submitted sufficient evidence to create a triable issue of fact that a reasonable jury could conclude that the character in the book is a portrayal of the plaintiff. The appellate court held that the plaintiff met this burden by showing, among other things, both the character and the plaintiff had the exact same unusual number of family members (10 boys and 3 girls, in the same birth order), were the eldest child, were the exact same age, were Latvian, had fathers who were Russian Protestant ministers, had families who performed as a band and toured in an old bus, and had family homes in Stockholm. Notably, the court explained that the plaintiff’s claim was buttressed by the affidavits of four readers of the novel who recognized plaintiff in the novel, as well as the plaintiff’s own affidavit that at least 12 people asked him if the book was about his family.

More than a decade later, the Second Circuit Court of Appeals also allowed a claim for libel-in-fiction to survive a motion to dis-
work is fictional.”31 The character is in fact the plaintiff, notwithstanding the reasonable reader must rationally suspect that the plaintiff is not the real person and her literary cognate as something more than amusing coincidence or something more than amusing coincidence or even conscious parallelism on a superficial plane. Rather, it is required that the reason-some more than amusing coincidence or even conscious parallelism on a superficial plane. Rather, it is required that the reason-

sufficient to survive a motion to dismiss. The defendant was acquitted with the plaintiff, the book’s character and the plaintiff had exactly the same first and last name (Melanie Geisler), and both were young, petite, and attractive. In the book, the character engaged in “tennis fraud” and “untoward sexual conduct.” The court was not persuaded by the disclaimer on the front of a fictional book, which the court described as “the standard disclaimer of intentional resemblance between its characters or episodes and real persons or actual events.”32

Most recently, in 2008, the Supreme Court of New York permitted a libel-in-fiction claim arising out of an episode of the television series Law & Order to survive a motion to dismiss. The television series features stories and characters based upon current events, and evokes the phrase “ripped from the headlines.” In Batra v. Wolf,33 the plaintiff (New York attorney Ravi Batra) complained that the series’ character (New York attorney Ravi Patel) was shown bribing a judge.34

The Batra court found sufficient similarity to survive a motion to dismiss. The court noted that the character and the plaintiff had the same unusual first name, were the same ethnicity (Indian-American), had the same job (attorney in New York), and the same general appearance. Moreover, the court noted that the plaintiff had been the subject of much news reporting, and so any person who knew him or heard of him would identify him with the fictional character. The court also found that the differences between them (e.g., that they were different types of lawyers and had offices in different locations) failed to outweigh the similarities.35

Although courts have failed to carve out a clear standard for how similar a fictional character needs to be in order for a plaintiff to succeed on a libel-in-fiction claim, the case law provides some genuine guidance for practitioners. Initially, and perhaps surprisingly, whether or not the plaintiff and defendant were acquainted with each other does not appear to be material. Courts have dismissed libel-in-fiction cases even when the defendant and the plaintiff had strong ties to each other. Indeed, whether or not the plaintiff was the “model,” “inspiration for,” or even the admitted “basis for” the fictional character is not the test in libel-in-fiction cases. Instead, the plaintiff is required to prove that the fictional character is “of and concerning” him or her. In undertaking the analysis of this question, the court will search both for similarities and dissimilarities between the plaintiff and the fictional character to determine whether a person who knows the plaintiff and who has seen the fictional work could reasonably conclude that the plaintiff is, in fact, the fictional character. Notably, courts have shown no reticence in making this determination as a matter of law, often stating that this is a question for the court itself to decide.

Equally notable, the courts have held that even when there are a number of similarities between the character and the plaintiff, the dissimilarities between them can—and often do—outweigh those similarities so that the dissimilarities alone refute any claim that the fictional character really identifies the plaintiff. This means that authors would be wise to change as many characteristics as possible from any living person who may serve as an inspiration for fiction—including name, hair color, build, and occupation, among other minor identifying characteristics.

Although no bright-line test has emerged, certain elements and watermarks have emerged as significant to the analysis. Generally, courts have not viewed the sharing of a common first name, such as Lisa or Bill, as significant similarities. However, if the shared first name is perceived as unique or unusual (such as Ravi), or if the character and the plaintiff share the same first and last name (such as Melanie Geisler), courts have viewed the similarity as significant.

Even when the character and the plaintiff share common or general characteristics or backgrounds—such as both graduated from college, enjoyed the same hobbies, had the same general job, were attractive and married—the similarities are not particularly strong evidence for the plaintiff. However, when the similarities are of an unusual or unique nature—for example, both came from a family of 13 children who toured as a music group—the plaintiff has a stronger claim. Of course, if the plaintiff can establish a large number of shared, unique similarities, the plaintiff’s claim will be particularly strong. At the other end of the spectrum, claims that are based upon superficial similarities only—even a large quantity of them—likely will not survive the pleading or summary judgment stages.

In addition, the more outrageous the description of the fictional character, the more likely a reasonable person will perceive the work as fictional and, therefore, the less likely the plaintiff can prevail. Thus, creators of fictional works are well served by making the fictional characters outlandish, ridiculous, and patently absurd. Indeed, when the fictional character is particularly awful or disgusting and the plaintiff tends to the opposite of those traits, the plaintiff will have a difficult time establishing that anyone would confuse him or her with the terrible fictional character. If the character’s attributes are not plausibly attributable to the plaintiff, then the plaintiff cannot succeed.

Thus, the submission of affidavits from third parties who know the plaintiff either can help or hurt the plaintiff’s libel-in-fiction claim. If the third parties attest that they recognize the fictional character as the plaintiff, but also state that they do not believe that the defamatory elements of the character are attributable to the plaintiff or are otherwise not a plausible aspect of the real-life plaintiff, the evidence will serve to show that the libel-in-fiction case is meritless. However, third-party affidavits can be used to show, at a minimum, that people identified the character as the plaintiff. While identification alone certainly is not sufficient to prove liability in a libel-in-fiction action, it is at least one element in doing so.

It can be important for the work to include a disclaimer that the work is fictional. Although use of a disclaimer is not disposi-
tive, many courts have found it to be a factor in the overall analysis. Indeed, the absence of disclaimers could give rise to the argument that the creator of the work intended its audience to believe that the work was based in fact rather than fiction.

Some makers of fictional works have employed the creative practice of putting an additional disclaimer within the body of the work itself. For example, one of the characters in the television show could the public figure, such as a celebrity or other well-known person. Such cases may frequently arise within the context of docu-dramas, which employ creative fictionaliza-
tions of real events and well-known people. (For more on this topic, see William Archer’s “Getting Real” on page 28.) Public figures also will need to demonstrate in court that the defendant acted with actual malice—i.e., that he or she made a statement with knowledge
that it was false or with reckless disregard of whether it was false or not. Courts have recognized that authors of fiction and docudramas have “literary license” under the First Amendment to alter true events. Accordingly, courts have expressly stated that engaging in the dramatization of real events does not, in and of itself, constitute evidence of actual malice. While people may be insulted when they think a fictional character is based upon them, more likely than not, they will face an uphill battle if they seek to sue the creators of the fictional work for libel. Although plaintiffs likely will be successful in only the most exceptional cases, the creators of fictional novels, television shows, and movies should be mindful of the litigation pitfalls that exist.

4 Id. at *8.
5 Id. at *15-18.
7 Id. at *15.
8 Id. at *15-18.
10 Id. at 137-40.
11 Id. at 148.
12 Id. at 146.
13 Id. at 147-49.
15 Id. at 319-20.
16 Id.
18 Id. at *1-3.
19 Id. at *9.
20 Id. at *10.
22 Id. at 1014.
24 Id. at 70-71.
25 Id. at 72, 76.
26 Id. at 82.
28 Id. at 650-51.
29 Id. at 653-54 & n.8.
30 Grisler v. Petrocelli, 616 F. 2d 636, 637-38 (2d Cir. 1980).
31 Id. at 639.
32 Id. at 638.
34 Id. at *4-5.
35 Id. at *6-9.
2012 INSTALLATION DINNER
THURSDAY, JUNE 14

LACBA
LOS ANGELES COUNTY BAR ASSOCIATION

DOROTHY CHANDLER PAVILION
135 NORTH GRAND AVENUE, LOS ANGELES

RECEPTION
6:00 P.M.

DINNER AND PROGRAM
7:00 P.M.

AFTER-DINNER COCKTAILS AND COFFEE
9:00 P.M.

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On Wednesday, May 9, the Antitrust and Unfair Business Practices Section will host a program on how to successfully settle, mediate, or arbitrate complex litigation. Resolving complicated litigation through trial or dispositive motion is time consuming and expensive. Too often, efforts to engage in productive settlement negotiations stall. Joseph W. Cotchett, Judge Philip S. Gutierrez, Judge Stephen G. Larson (retired), Magistrate Judge Margaret A. Nagle, Kenneth R. O’Rourke, and Judge Dickran Tevrizian (retired) will discuss ways to break the logjam. The program will take place at O’Melveny & Myers LLP, 400 South Hope Street, 18th floor, Downtown. Entrances to parking lot are off Grand, Hope, and 4th Street. On-site registration will be available at 5 P.M., with the meal and reception at 5:30, and the program continuing from 6:00 to 7:30 P.M. The registration code number is 011642. The prices below include the meal.

$22—CLE+ member
$45—Antitrust Section and LACBA members
$80—all others
1.5 CLE hours

Personal Injury Damages

On Thursday, May 17, the Barristers Section will host a program featuring experienced trial attorneys Phillip A. Baker and Brian J. Panish, who will discuss their top strategies for maximizing and minimizing damages awards in personal injury cases. They will identify the key elements that shape the value of a personal injury case and how to develop and present the evidence needed to effectively demonstrate or rebut damages at trial. This program will be moderated by Los Angeles Superior Court Presiding Judge Lee Edmon. Seating is limited. The meal and reception will follow the program, which will take place at Panish Shea & Boyle LLP, 11111 Santa Monica Boulevard, Suite 700, in Los Angeles. On-site registration will be available at 6 P.M., with the program continuing from 6:30 to 7:30 P.M. The registration code number is 011579. The prices below include the meal.

$20—CLE+ member
$65—Barristers Section member
$75—IACBA member
$95—all others
1 CLE hour

Employment-Based Immigration

On Saturday, May 19, the Immigration Law Section will host a program—led by speakers Paul D. Cass, Eileen S. Chun-Fruto, Pamela Forster, Catherine L. Haight, Blake G. Miller, and Matthew F. Spaulding—on the current state of employment-based nonimmigrant categories (TN, H-1B, H-2B, E-1, E-2, L-1, O-1s, P, and R-1) and employment-based immigrant categories (special immigrant religious workers, EB-1, EB-2, EB-3, and labor certifications), with an emphasis on potential pitfalls and strategic lawyering. There will be 15 minutes for questions and answers at the conclusion of each panel discussion. The program will take place at the Los Angeles County Bar Association, 1055 West 7th Street, 27th floor, Downtown. Parking is available at 1055 West 7th and nearby lots. The registration code number is 011649. On-site registration and the meal will begin at 8 A.M., with the program continuing from 9 A.M. to 1:30 P.M. The prices below include the meal.

$50—CLE+ member
$75—Immigration Law Section members
$100—IACBA member
$135—all others
4 CLE hours
Is the California Legislature Listening?

FOR 30 YEARS, CALIFORNIA’S TALENT AGENCIES ACT has been a hotbed of litigation. The act prohibits anyone who is not a licensed talent agent from procuring employment for artists, which include actors, directors, recording artists, songwriters, models, and a vast number of other types of entertainers.

Over the years, the labor commissioner and the courts have grossly expanded the term “procuring,” as used in the act, to include any form of negotiation whatsoever, which of course is not consistent with anyone else’s definition of “procuring.” In theory, if a talent agreement already has been negotiated, but an actor wants an extra pillow for the trailer, the actor’s manager cannot ask for that pillow without violating the act—unless the manager is asked to do so by a licensed talent agent. I have written numerous articles on the act, and almost every one of them criticizes it on the same theme: The act is completely out of touch with the reality of the entertainment industry and must be amended. Courts finally seem to be getting the message.

In 2008, the U.S. Supreme Court decided Preston v. Ferrer, determining that an arbitration clause in a management agreement, like every other agreement, is binding. In the past, the labor commissioner had taken the bootstrap position that, if the commissioner found a violation of the act, and the management agreement was therefore unenforceable, so too were any arbitration provisions. Now, if there is an arbitration clause in a management agreement, it is up to the arbitrator, and not the labor commissioner (notwithstanding Styne v. Stevens), to determine whether or not the act was violated, and the labor commissioner never gets to review the matter.

Also in 2008, the California Supreme Court decided Marathon v. Blasi, holding that management agreements, like all other agreements, are severable. In the context of the act, that means that one violation of the act by a personal manager will most likely no longer result in the loss of a lifetime of commissions. Each violation now will be reviewed as a single instance that may be viewed in conjunction with lawful activities by the manager, and only if the unlawful activities pervade the entire relationship will a manager lose all of his or her commissions.

Although the U.S. Supreme Court and the California Supreme Court finally have listened, the California Legislature has not listened to anyone since 1986. In the Marathon decision, the California Supreme Court suggested that, because the act leads to unfair results that are incompatible with the realities of today’s entertainment industry, the California Legislature could consider revisiting the act. However, the legislature has made no review and no statutory changes.

More disturbing than the legislature’s failure to listen, however, is that artists never have listened either. It is not difficult to understand why the Association of Talent Agents (ATA) is so vocal about main-

It is very difficult to dispute that the Talent Agencies Act is terrific for agents and absolutely horrible for artists.

taining the act in its present form—the act should be renamed the Full Employment Act for Agents. The ATA even challenged an amendment proposed by the Beverly Hills Bar Association a few years ago to exempt lawyers from the act. Clearly, talent agents love the act as it stands.

However, it is difficult to imagine why the Screen Actors Guild consistently would support the act. There is no question that the act does not protect artists, as it was intended to do. When an artist decides that he or she wants to fire his or her manager, the act is a very convenient sword to use in exit negotiations (which was certainly not its intended use). But the act’s general impact on artists is fairly devastating.

Many A-list artists feel that having a manager is much more important to them than having an agent, and they understandably do not want to pay two commissions. However, the act essentially mandates that they pay an agent whether they want to or not.

Granted, nobody is going to feel too much sympathy for the superheroes, but what about the novice artist? There are fledgling actors all over the city that no agent will touch, but they often are able to find ethical, experienced managers who are willing to invest time and money to create some momentum in the actors’ careers. Is it likely that managers will invest time and money developing an artist while knowing that they will never be paid for it?

Similarly, more than ever, bands need to tour to develop a significant following in order to attract record label interest. Without a solid record deal or at least a large following, it is highly unlikely that a band will ever secure an agent. How is a band going to survive if its manager cannot help book a tour?

It is very difficult to dispute that the Talent Agencies Act is terrific for agents and absolutely horrible for artists. It is beyond comprehension that union leadership has never figured that out. As the late Gerry Margolis, a fellow outspoken opponent of the act, once asked, In an industry in which many actors cannot even get into the Screen Actors Guild, and 95 percent of SAG members are unemployed, how is it conceivable that a law that actually reduces the number of people who are allowed to find work for those actors can actually be good for actors?

Edwin F. McPherson is a partner at McPherson Rane LLP, a Century City entertainment litigation firm. He has written numerous articles and has acted as an expert witness regarding the Talent Agencies Act.
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